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Supreme Court, U.S.
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No. _____

United States Supreme Court
October Term 1993

State of California,

Petitioner.

Jose Ronillo Abogado LUCERO,
Jimmie JOHNSON,
WALNUT PROPERTIES, INC.,
a California Corporation,

Respondents.

Petition for Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division Seven

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LONG BEACH CITY PROSECUTOR
John A. Vander Lans
City Prosecutor
Robert R. Recknagel
Assistant City Prosecutor
Gerry L. Ensley
Deputy City Prosecutor
400 West Broadway, Room 207
Long Beach, California 90802
Telephone: (310) 437-0711

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APPENDIX # 1

(Lucero I)

People v. Superior Court (Lucero)
(1989) 49 Cal.3d 14
[259 Cal.Rptr. 740, 774 P.2d 769]

259 Cal.Rptr. 740 (Cal. 1989)

774 P.2d 769

49 Cal.3d 14

The PEOPLE, Petitioner

v.

The SUPERIOR COURT of Los Angeles County, Respondent;

Jose Ronillo Abogado LUCERO et al., Real Parties in Interest.

No. S002438.

Supreme Court of California.

June 29, 1989.

Rehearing Denied Aug. 24, 1989.

People sought writ of mandate to compel Superior Court to vacate judgment which had granted peremptory writ of mandate directing municipal court to sustain demurrers to charge of violation of adult theater zoning ordinance. The Court of Appeal, 244 Cal.Rptr. 502, denied request for writ of mandate. Review was granted, superseding opinion of court of Appeal. The Supreme Court, Lucas, C.J., held that: (1) ordinance would not be constitutional if interpreted to apply to a single use of a theater for showing adult films, but (2) ordinance was constitutional if applied to a regular and

substantial course of conduct.

Affirmed.

Mosk, J., filed an opinion concurring in part and dissenting in part.

Kennard, J., filed an opinion concurring in part and dissenting in part in which Broussard, J., joined.

LUCAS, Chief Justice.

This case involves the enforcement of a Long Beach zoning ordinance that prohibits the location of "adult entertainment businesses" (including adult motion picture theaters) within 500 feet of residential areas, or 1,000 feet of public schools or churches (Long Beach Mun. Code, ch. 21.51, hereafter Chapter 21.51). The ordinance is described as a "non-cluster" or "Anti-skid Row" ordinance because it is designed to discourage development of a "skid row" area by limiting the harmful secondary effects of adult entertainment businesses on adjacent areas, and by insuring such businesses do not contribute to the blighting of surrounding neighborhoods. (See Chapter 21.51.010, "Purpose.") It was patterned after a Detroit adult entertainment zoning ordinance upheld in *Young v. American Mini Theaters, Inc.* (1976) 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310.

The question before us concerns the appropriate constitutional standard by which to define the "use" necessary to make a movie theater an "adult motion

picture theater" within the meaning of the ordinance.[1] In *Pringle v. City of Covina* (1981) 115 Cal.App.3d 151, 171 Cal.Rptr. 251 the Court of Appeal held that an adult entertainment zoning ordinance cannot be enforced against an adult motion picture theater unless a "preponderance" (meaning "more often than not") of the "adult" films shown by the establishment have as their dominant theme the depiction of the ordinance's enumerated sexual activities.

In following *Pringle*, subsequent cases interpreting adult entertainment ordinances have required "use" to be defined as "over 50 percent." (*Strand Property Corp. v. Municipal Court* (1983) 148 Cal.App.3d 882, 889, 200 Cal.Rptr. 47 [construing "use" defined under the ordinance as a substantial or significant portion of the total presentation time to mean a "preponderance" that must be defined as "over 50 percent"]; *Kuhns v. Board of Supervisors* (1982) 128 Cal.App.3d 369, 376, 181 Cal.Rptr. 1 [construing "use" defined as a "substantial or significant portion of stock in trade" in adult bookstore ordinance to mean "over half of a bookstore's stock"].) Moreover, the present Court of Appeal believed the People were bound by *Pringle*'s preponderance standard. (Post, at p. 742-743 of 259 Cal.Rptr., at p. 771-772 of 774 P.2d) We disagree. As we explain, although municipalities are free to adopt such a test in defining "use" under an adult entertainment

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[1] The ordinance defines an adult motion picture theater as "an enclosed building with a capacity of fifty or more persons used for presenting material distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas for observation by patrons therein." (Chapter 21.51, § 21.51.020, subd. (A)(2).) Chapter 21.51 is set forth in the appendix.

ordinance, we conclude *Pringle*'s preponderance standard in not constitutionally compelled. In place of such a test, we adopt a constitutional standard similar to that recently approved by the United Stated Supreme Court and several state courts: cities may zone the location of theaters that show, on a regular basis, films characterized by an emphasis on the "specified anatomical areas" identified in the ordinance, where such films constitute a substantial portion of the films shown or account for a substantial part of the revenues derived from the exhibition of films (hereafter "the regular and substantial course of conduct" standard). (See, e.g., *Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41, 55, fn. 4, 106 S.Ct. 925, 933, fn. 4, 89 L.Ed.2d 29; *Young*, supra, 427 U.S. at p. 59, 96 S.Ct. at p. 2447; see also *Town of Islip v. Caviglia* (1988) 141 A.D.2d 148, 151, fn. 2, 532 N.Y.S.2d 783, 784-785, fn. 2.)

I. *Facts*

Real parties in interest Jose Ronillo Abogado Lucero, Walnut Properties, Inc., and Jimmie Johnson (hereafter real parties were charged in separate misdemeanor complaints with numerous counts of unlawfully establishing an adult entertainment business in violation of Chapter 21.51.

Real parties' establishment, the Lakewood Theater, has two screens: one screen shows general release films and one screen shows adult films. Each count of the misdemeanor complaints specifically alleged real parties unlawfully established an adult theater in violation of Chapter 21.51 by exhibiting an X-rated movie on a particular day within the distances proscribed by the ordinance.

Real parties filed demurrers to the complaints on the ground that exhibition of a single adult film, as alleged in the complaints, did not make the theater an adult entertainment business under the preponderance standard established by *Pringle*, supra, 115 Cal.App.3d 151, 171 Cal.Rptr. 251. After the municipal court overruled the demurrers, real parties petitioned the superior court for a peremptory writ of mandate directing the lower court to sustain the demurrers. The superior court granted the writ with leave to amend. The People declined to amend and instead requested the Court of Appeal to issue a writ of mandate to compel the superior court to vacate its judgment.

[1] The Court of Appeal denied the writ and rejected the People's contention that a *single* showing of an adult film makes the theater an adult motion picture theater within the meaning of the zoning ordinance. The court first rejected the People's argument that the "single use" standard adopted by the Court of Appeal in Walnut Properties v. Ussery (Cal.App.)[2] should control the outcome of the present litigation under the law of the case and collateral estoppel doctrines.[3]

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[2] We ordered the opinion not published in the Official Reports by order dated June 24, 1986 (B005781).

[3] The *Ussery* case involved the same parties, theater and ordinance as in the present case. The court in *Ussery* observed that the only way to prevent the undesirable effects of adult theaters on the surrounding neighborhoods, and to implement the zoning ordinance according to the intent of its drafters, was to prohibit any use of the theater for showing adult motion pictures.

In rejecting the People's law-of-the-case and collateral estoppel arguments, the Court of Appeal observed, "[t]he cases before us are criminal ones

Next, in rejecting the People's contention that a "single use" standard should apply, the Court of Appeal cited with approval *Tollis, Inc. v. San Bernardino County* (9th Cir.1987) 827 F.2d 1329, which held that a "single use" interpretation of an adult entertainment zoning ordinance was unconstitutional in the absence of evidence "that a single showing of an adult movie would have any harmful secondary effects on the community." (Id. at p. 1333.) The Court of Appeal then denied the People's petition for writ of mandate because the complaints "did not allege, in accordance with the requirements of *Pringle*, that the preponderance of films exhibited and observed by patrons at the Lakewood Theatre were 'distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specific anatomical areas' (Chapter 21.51.020(A) . . .) as those terms are defined in Chapter 21.51.020(B)(1-7) and

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instituted well after *Ussery*, a civil case, became final. Because the criminal cases presently before us and *Ussery* are not the 'same case' the doctrine of law of the case does not apply." We agree. We also agree with the Court of Appeal's decision not to apply the collateral estoppel doctrine to defendants. First, it is highly questionable whether a prior determination against a party in a civil action may be applied as a collateral estoppel against that same party in a criminal action. (See *Ashe v. Swenson* (1970) 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469.) In addition, as the Court of Appeal observed: "[I]f *Ussery* were given collateral estoppel effect in this case the single instance standard would apply to Lakewood Theater and the preponderance standard enunciated in *Pringle* [115 Cal.App.3d 151, 171 Cal.Rptr. 251] which is the only published decision on this issue would apply to all other theaters. Such a result would clearly be unjust and would disserve the public interest. (See *Consumers Lobby Against Monopolies v. Public Utils. Com.* (1979) 25 Cal.3d 891, 902 [160 Cal.Rptr. 124, 603 P.2d 41].)"

(C)(1-2) of the Long Beach Municipal Code.) In reviewing the Court of Appeal opinion, we examine the People's argument requesting we affirm as constitutionally permissible a "single use" standard.

II. *Background*

A. Constitutionality of adult entertainment zoning

In August 1977 Walnut Properties, Inc. (hereafter Walnut) obtained a business license to operate a motion picture theater on the representation that it intended to exhibit nonadult films. (*Walnut Properties v. City Council of the City of Long Beach* (1980) 100 Cal.App.3d 1018, 1024, 161 Cal.Rptr. 411.) In November of that year, following the high court's decision in *Young*, supra, 427 U.S. 50, 96 S.Ct. 2440, the city enacted Municipal Code Chapter 9120.41, which was amended in 1979 to become Chapter 21.51, the ordinance at issue in the present case. The 1979 ordinance is substantially similar to the 1977 version -- its primary purpose being to regulate the location of adult motion picture theaters. After the ordinance was passed Walnut began showing adult films.

In December 1977, shortly after Walnut opened its theater, the Long Beach City Council instituted proceedings culminating in the revocation of Walnut's operating license. Walnut sued the city, challenging the constitutionality of the ordinance. (*Walnut Properties*, supra, 100 Cal.App.3d at p. 1020, 161 Cal.Rptr. 411.) After conceding that its theater was an "adult entertainment business" as defined by the ordinance, Walnut argued the ordinance violated the First Amendment's freedom of speech clause as an unconstitutional regulation of constitutionally protected

conduct. In addition, Walnut claimed that the ordinance was vague, overbroad and vested public officials with impermissible discretion to enforce its terms. (Id. at p. 1021, 161 Cal.Rptr. 411; see, e.g., *Burton v. Municipal Court* (1968) 68 Cal.2d 684, 68 Cal.Rptr. 721, 441 P.2d 281.) The ordinance survived constitutional scrutiny, however, after the Court of Appeal found *Young*, supra, 427 U.S. 50, 96 S.Ct. 2440, dispositive of the constitutional issues. (*Walnut Properties*, supra, 100 Cal.App.3d at p. 1023, 161 Cal.Rptr. 411.)

[2] The two Detroit ordinances at issue in *Young* were termed "Anti-skid Row" ordinances because they prohibited (except where a special waiver was obtained) locating adult theaters and adult bookstores with 1,000 feet of any two other "regulated uses" or within 500 feet of any residential zone. The ordinances' definition of an "adult motion picture theater" was identical to that of the Long Beach ordinance we discuss here. (*Young*, supra, 427 U.S. at pp. 53-54, fn. 5, 96 S.Ct. at pp. 2444-2445, fn. 5.)

The plurality, led by Justice Stevens, upheld the ordinances on the basis they were not directed at restricting speech, but rather were reasonable time, place and manner regulations necessary to further the city's significant interest in preserving the character of its neighborhoods. The *Young* court concluded that as long as such ordinances were enacted to regulate the location of adult theaters in order to protect neighborhoods from deterioration, increased crime and other harmful secondary effects, they did not offend either the First Amendment or the Equal Protection Clause of the Fourteenth Amendment. (*Young*, supra, 427 U.S. 50, 68-73, 96 S.Ct. 2440, 2451-2454; see *Developments in the Law*

-- *Zoning* (1978) 91 Harv.L.Rev. 1427, 1557-1559.)[4]

Based on the high court's reasoning in *Young*, supra, 427 U.S. 50, 96 S.Ct. 2440, the *Walnut Properties* Court of Appeal rejected Walnut's First Amendment

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[4] The *Young* court noted that under the ordinances "adult films may only be exhibited commercially in licensed theaters.) (*Young*, *supra*, 427 U.S. at p. 62, 96 S.Ct. at p. 2448.) The court observed, however, that the "city's general zoning laws require all motion picture theaters to satisfy certain locational as well as other requirements; we have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, either by confining them to certain specific commercial zones or by requiring that they be dispersed throughout the city. The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances." (Ibid.)

The *Young* court also rejected the theater owner's vagueness attack on the ordinances on the basis that "Neither respondent . . . alleged any basis for claiming or anticipating any waiver of the restriction as applied to its theater." (*Young*, *supra*, 427 U.S. at p. 59, 96 S.Ct. at p. 2447.) The court observed that "the only vagueness in the ordinances related to the amount of sexually explicit activity that may be portrayed before the material can be said to be 'characterized by an emphasis' on such matter. For most films the question will be readily answerable; to the extent that an area of doubt exists, we see no reason why the ordinances are not 'readily subject to a narrowing construction by the state court's . . . . [W]e think this is an inappropriate case in which to adjudicate the hypothetical claims of persons not before the Court." (Id. at p. 61, 96 S.Ct. at p. 2448.)

Finally, the court held that the Detroit ordinance created no "significant deterrent effect" that would justify invocation of the First Amendment "overbreadth" doctrine. (*Young*, *supra*, 427 U.S. at pp. 59-60, 96 S.Ct. at pp. 2446-2447.)

argument. The court reasoned, "It is clearly within the power of the City to provide that *no* motion picture theatre can be operated in a residential area or near a public school. The thrust of Justice Stevens' opinion in *Young* was that it was also within the City's power to classify theatres according to the content of the films exhibited, so long as that classification has a reasonable basis. The 'adult entertainment' classification is a reasonable one. [¶] Walnut has presented no evidence that the City's ordinance in any way restricts or eliminates the access to the 'adult entertainment' for those persons who desire to patronize it. In fact, Walnut operates another such theater in a different part of the City. From records which we may judicially notice, it appears that Long Beach has a number of 'adult' forms of entertainment operating within its boundaries." (*Walnut Properties*, supra, 100 Cal.App.3d 1018, 1023, 161 Cal.Rptr. 411.)

B. *Pringle's "preponderance" standard*

In *Pringle*, supra, 115 Cal.App.3d 151, 171 Cal.Rptr. 251, the City of Covina had enacted a "non-cluster" zoning ordinance prohibiting location of adult entertainment theaters within 500 feet of residential and other enumerated areas. The ordinance employed a substantially similar definition of an adult theater as the Long Beach ordinance we review herein. (Post, at fn. 1; see Covina Mun.Code, § 17.04.026.2.) The ordinance declared its purpose was "'to insure that adverse effects [arising from the "serious objectionable operational characteristics" of adult theaters] will not contribute to the blighting or downgrading of the surrounding neighborhood and will not unreasonably interfere with or injure nearby properties.'" (Id. at p. 154, 171 Cal.Rptr.

251, quoting from Covina Mun.Code, § 17.04.026.2.)

The plaintiffs, a neighborhood theater owner and a patron, instituted an action for declaratory and injunctive relief "alleging that the ordinance violated federal and state guarantees of freedom of speech, due process and equal protection. They claimed that the ordinance was unconstitutional on its face and, as construed to apply 'to the operation of a neighborhood theater which shows a variety of films including a few films which, although not obscene, explicitly depict sexual activity arguable within the scope of the ordinance.' They further argued that the terms 'distinguished or characterized by an emphasis' and 'used' were too vague and chilled freedom of expression." (*Pringle*, supra, 115 Cal.App.3d at p. 155, 171 Cal.Rptr. 251.) The defendant city argued that the ordinance was valid under *Young*, supra, 427 U.S. 50, 96 S.Ct. 2440, and asserted that the term "use" should be construed as meaning "'[o]ne showing of a film described in the ordinance.'" (*Pringle*, supra, 115 Cal.App.3d at p. 156, 171 Cal.Rptr. 251.)

The *Pringle* court recognized that it was faced "with an actual, not hypothetical, claim of uncertainty deterring the exercise of protected speech" (115 Cal.App. 3d at p. 160, 171 Cal.Rptr. 251), and that it was bound to construe the legislation "if reasonably possible to preserve its constitutionality." The court first construed the ordinance's applicability regarding the dominant or essential theme of the movie. (At p. 160, 171 Cal.Rptr. 251.) It concluded that "adult films under the ordinance include only films whose dominant or predominant character and theme is the depiction of the enumerated sexual activities or anatomical areas." (Ibid.)

Next, the court determined that the word "used" in

the "ordinance's definition of an adult theater as a building 'used for presenting' sexually explicit material" rendered the ordinance vague -- and hence constitutionally infirm -- because it failed to indicate "what proportion of a theatre's programming would constitute 'use.'" (*Pringle* court defined "use" under the ordinance to mean "to practice customarily," but qualified the phrase to mean "more often than not." Based on the foregoing, the court adopted a "preponderance" standard. (Id. at p. 162, 171 Cal.Rptr. 251.)

C. Post-Young federal cases

Two federal decisions decided after *Young*, supra, 427 U.S. 50, 96 S.Ct. 2440, and *Pringle*, supra, 115 Cal.App.3d 151, 171 Cal.Rptr. 251, shed further light on the interpretation of language similar to that at issue here. Both involved constitutional challenges to adult entertainment zoning ordinances similar to the one examined by the court in *Young*.

In *Renton v. Playtime Theatres, Inc.*, supra, 475 U.S. 41, 106 S.Ct. 925, two theater operators whose theaters exhibited adult films and were located within an area proscribed by adult entertainment zoning restrictions challenged the Renton ordinance under the First and Fourteenth Amendments. The high court determined that the ordinance was a valid "time, place and manner" measure because it did "not ban adult theaters altogether, but merely provide[d] that such theaters [could] not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school." (Id. at p. 46, 106 S.Ct. at p. 928.) Next, while recognizing that the Renton ordinance treated "theaters that specialize in adult films differently from other kinds of theaters" (id. at p. 47, 106 S.Ct. at p. 929), the court observed that the

regulation "was unrelated to the suppression of free expression" because it did not proscribe the content of the films, but rather was concerned predominately with the deleterious secondary effects of adult theaters on the neighboring community. (Ibid.)

In concluding that the ordinance was "designed to serve a substantial government interest and allow[ed] for reasonable alternative avenues of communication," the *Renton* court stated that the city's substantial interest in preserving "'the quality of urban life'" justified the enactment. (*Renton*, supra, 475 U.S. at p. 50, 106 S.Ct. at p. 930.) Moreover, the court observed that it was appropriate for Renton to have relied on relevant studies conducted by other cities on the need for zoning controls of adult theaters in order to establish its "substantial government interest" in regulating adult theaters. (Id. pp. 51-52, 106 S.Ct. at pp. 930-931.)[5]

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[5] The *Renton* court specifically stated that "Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the 'detailed findings' summarized in the Washington Supreme Court's *Northend Cinema [Inc. v. Seattle*, 90 Wash.2d 709, 585 P.2d 1153 (1978)] opinion, in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." (Id. 475 U.S. at pp. 50-52, 106 S.Ct. at pp. 930-931.)

Finally, the court observed that the method chosen by a city to further its substantial interests -- e.g., cluster as opposed to noncluster zoning -- would not affect its holding. The court noted that "cities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton, 'It is not our

The court further noted that the Renton ordinance left approximately 520 acres open to use as potential adult theater locations. Accordingly, the court determined the ordinance would allow "for reasonable alternative avenues of communication."[6] (*Renton*, supra, 475 U.S. at p. 53, 106 S.Ct. at p. 932.) Thus, the court concluded, the ordinance represented a valid governmental response to the serious problems created by adult theaters and met the goals of the city in preserving the quality of life within the community while "satisfying the dictates of the First Amendment." (Id. at pp. 54-55, 16 S.Ct. at pp. 932-933.)

Thereafter, in 1987, an operator of an adult motion picture establishment challenged, in federal court, the constitutionality of a San Bernardino County ordinance similar in language and substance to the "Anti-skid Row"

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function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas . . . . [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.'" (Id. at p. 52, 106 S.Ct. at p. 931, quoting *Young, supra*, 427 U.S. at p. 71, 96 S.Ct. at p. 2453, original brackets.)

[6] In response to the theater owner's (respondents) argument that there were no "commercially viable" adult theater sites within the 520 acres left available by the Renton ordinance, the court observed that "we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices.
. . . In our view, the First Amendment required only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement." (*Renton*, supra, 475 U.S. at p. 54, 106 S.Ct. at p. 932.)

ordinances discussed above, with the exception that the ordinance was silent as to its predominate purpose. (*Tollis, Inc. v. San Bernardino County*, supra, 827 F.2d 1329, 1332.) The county argued that the ordinance should be construed so as to prohibit even a "single showing" of an adult motion picture. The theater owner responded that such construction would be unconstitutionally overbroad on its face under *Young*, supra, 427 U.S. 50, 96 S.Ct. 2440, and *Renton*, supra, 475 U.S. 41, 106 S.Ct. 925. (*Tollis*, supra, 827 F.2d at p. 1331.)

[3] The Ninth Circuit agreed with the theater owner and found that a "single use" standard could not pass "constitutional muster as a content-neutral time, place, and manner regulation" because it could not be justified as serving a substantial governmental interest in preserving the quality of urban life. (*Tollis*, supra, 827 F.2d at pp. 1332-1333.) As we explain below, we believe, like the *Tollis* court, that so construed the Long Beach ordinance would be unconstitutional.

III. A *constitutional zoning standard*

Although *Tollis*, supra, 827 F.2d 1329, is not dispositive, we believe it applied the correct constitutional principal first articulated in *Young*, supra, 427 U.S. 50, 96 S.Ct. 2440, and developed by *Renton*, supra, 475 U.S. 41, 106 S.Ct. 925. As *Tollis* recognized, *Renton* required the court to determine whether the ordinance, as implemented, is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication. (*Tollis*, supra, 827 F.2d at pp. 1332-1333.) Like the Ninth Circuit, we find a "single use" standard is insufficiently tailored to serve

Long Beach's stated purpose of preventing the clustering or concentration of adult motion picture theaters in any one area. Nothing in the Long Beach ordinance's statement of purpose discloses the presence of significant deleterious effects on the community arising out of a single showing of an adult film. We also agree with the *Tollis* court that a single showing of an adult movie does not necessarily create the "logical relationship between the evil feared and the method selected to combat it." (Id. at pp. 1332-1333.)[7]

Nor do we believe, however, that *Pringle*'s preponderance standard is constitutionally compelled. As stated above, *Pringle* would allow the zoning of adult theaters only if a preponderance (construed to mean "more often than not" or "most often") of the films shown have as their dominant theme the depiction of the ordinance's enumerated sexual activities. (*Pringle*, supra, 115 Cal.App.3d at p. 162, 171 Cal.Rptr. 251.) We find nothing in the high court's cases suggesting such a standard is required. Indeed, a preponderance standard violates the spirit of the high court's cases. Those decisions expressly recognize a state's legitimate interest in regulating adult entertainment establishments, and accord local governments substantial discretion in defining the scope and nature of such regulation. (*Young*, supra, 427 U.S. at p. 61, 96 S.Ct. at p. 2448; *Renton*, supra, 475 U.S. at pp. 51-52, 106 S.Ct. at pp. 930-931.)

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[7] Real parties argue that if we were to impose a single use standard in this case, the procedures for obtaining a waiver would operate as an invalid prior restraint on theater owners. Because we reject the "single use" standard as unconstitutional on other grounds, we need not consider the merits of this claim.

Accordingly, we conclude that *Pringle*, in striving to construe the term "used" within the confines of constitutional principles, established a standard that is too high.[8]

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[8] The exact basis of the *Pringle* decision is not entirely clear. To the extent *Pringle* may be interpreted as a constitutional "floor" in the traditional sense (i.e., that the municipalities are constitutionally precluded from regulating theaters showing less than a preponderance of adult films), we believe it to be inconsistent with the basic principles of *Young* and *Renton* and unduly restrictive of the municipalities' legitimate interest in regulating adult entertainment establishments. (See post, fn. 10.) It defies common sense to hold that a theater exhibiting (adult" films during less than 51 percent of its total operating time *must* be treated as something other than an adult establishment as that term can be reasonably understood in this context. Nonetheless, so long as the theater does not "preponderantly" or "more often than not" exhibit adult movies, *Pringle's* test allows adult entertainment theaters to be established in contravention of the purpose of the ordinance.

Moreover, to the extent *Pringle* may be interpreted as an exercise of simple statutory construction, we find it equally flawed. The *Pringle* court correctly noted that vague or ambiguous terms in a legislation are to be construed, where possible, so as to preserve their constitutionality. (*Pringle*, *supra*, 115 Cal.App.3d at p. 160, 171 Cal.Rptr. 251.) In so doing, however, the court must give the ordinance a construction which conforms both to the dictates of the Constitution and to the purposes of the enactment. Indeed, we believe the "regular and substantial course of conduct" is a reasonable interpretation of "use" under the Long Beach ordinance because it more closely conforms to the purpose of the ordinance than did *Pringle's* preponderance (over 50%) test. Accordingly, we must reject *Pringle* on statutory construction grounds as well.

The question then becomes whether we can articulate a constitutional standard that will both implement the purpose of the ordinance and abide by the requirements of *Young*, supra, 427 U.S. 50, 96 S.Ct. 2440, and *Renton*, supra, 475 U.S. 41, 106 S.Ct. 925 (i.e., that an ordinance be content-neutral and narrowly tailored to minimize only the adverse secondary effects related to adult entertainment establishments). The Long Beach ordinance was passed specifically because "[T]he city council [found] that adult entertainment businesses, because of their very nature, are recognized as having objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances, thereby having a deleterious effect upon the adjacent areas. Special locational regulation of these businesses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhoods. The primary purpose of the regulation is to prevent the concentration or clustering of these businesses in any one area." (Long Beach Mun. Ord. C-5487 § 1 (1979).)

[4] Because adult entertainment ordinances are aimed at regulating the clustered establishment of adult entertainment businesses and not at prohibiting theater owners from occasionally exhibiting an "adult" film, we conclude a "regular and substantial course of conduct" standard must appropriately defines the constitutional level of "use" for purposes of such ordinances. In so doing, we allow cities a greater flexibility in the zoning of adult entertainment theaters, thereby construing the ordinance in a constitutional manner while allowing a reasonable and practical construction in conformity with the purpose of the enactment. (*Welton v. City of Los Angeles* (1976) 18 Cal.3d 497, 506, 134 Cal.Rptr. 668, 556 P.2d 1119; *Shea v. Board of Medical Examiners* (1978) 81

Cal.App.3d 564, 574, 146 Cal.Rptr. 653.)

By interpreting the term "used" in this case to mean a "regular and substantial course of conduct," we give the ordinance a construction that is rationally tailored to support its asserted purpose of preventing neighborhood blight without allowing Long Beach to use "the power to zone as a pretext for suppressing expression." (*Young*, supra, 427 U.S. at p. 84, 96 S.Ct. at p. 2459.) Under this standard, zoning restrictions such as contained in the ordinance at issue here would apply to all adult entertainment theaters offering adult fare as a substantial part of their regular business, but would not apply to theaters showing only occasional or incidental adult movies.[9] To the extent *Pringle*, supra, 115 Cal.App.3d 151, 171 Cal.Rptr. 251, conflicts with the foregoing standard, the case is disapproved.[10]

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[9] We recognize that although our definition is not exact, it is "reasonably specific and precise, bearing in mind that unavoidable imprecision is not fatal and celestial precision is not necessary." (*Hart Book Stores, Inc. v. Edmisten* (4th Cir. 1979) 612 F.2d 821, 833, cert. den. (1980) 447 U.S. 929, 100 S.Ct. 3028, 65 L.Ed.2d 1124.) We emphasize Long Beach is free to further define the standard -- for example, by making reference to a percentage of films shown, or the percentage of revenue received by the adult entertainment business. It may also amend its ordinance to impose less restrictive standards.

[10] As stated above *Pringle's* "preponderance" standard has been interpreted in Court of Appeal cases as requiring the showing of over 50 percent adult movies before a theater can be labeled an adult theater: *Kuhns v. Board of Supervisors*, supra, 128 Cal.App.3d 369, 376, 181 Cal.Rptr. 1; Strand Property Corp. v. Municipal Court, supra, 148 Cal.App.3d 882, 889-890, 200 Cal.Rptr. 47. These cases predate *Renton, supra*,

IV. *Disposition*

The People, having alleged multiple violations of Chapter 21.51, section 21.51.030 of the Long Beach Municipal Code, each based on the unconstitutional "single use" standard, are not entitled to proceed with the action as pleaded. Accordingly, the judgment of the Court of Appeal is affirmed.[11]

PANELLI, EAGLESON and KAUFMAN, JJ., concur.

APPENDIX

LONG BEACH MUNICIPAL CODE
CHAPTER 21.51

SECTION 21.51.010 PURPOSE.

The city council finds that adult entertainment businesses because of their very nature, are recognized as having objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances, thereby having a deleterious effect upon the adjacent areas. Special locational regulation of

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475 U.S. 41, 106 S.Ct. 925, and merely rely on *Pringle*. To the extent they interpret *Pringle* as imposing a constitutional floor, we find they are no more persuasive than *Pringle*, *supra*, and are likewise disapproved.

[11] Of course, our disposition does not preclude the People from prosecuting future violations of Chapter 21.51 under the "regular and substantial course of conduct" standard discussed above.

these businesses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhoods. The primary purpose of the regulation is to prevent the concentration or clustering of these businesses in any one area. This chapter shall be deemed a reenactment of the preexisting ordinance on this subject matter. (Ord. C-5487 § 1 (part), 1979: prior code § 9120.17(a)).

SECTION 21.51.020 DEFINITIONS.

A. For purposes of this chapter, the adult entertainment businesses are defined as follows:

2. "Adult motion picture theater" means an enclosed building with a capacity of fifty or more persons used for presenting material distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas for observation by patrons therein.

B. For purposes of this chapter, "specified sexual activities" shall include the following:

1. Actual or simulated sexual intercourse, oral copulation, anal intercourse, oral anal copulation, bestiality, direct physical stimulation of unclothed genitals, flagellation or torture in the context of sexual relationship, or the use of excretory functions in the context of a sexual relationship, and any of the following depicted sexually oriented acts or conduct: analingus, buggery, coprophagy, coprophilia, cunnilingus, fellatio, necrophilia, pederasty, pedophilia, piquerism, sapphism, zooerasty; or

2. Clearly depicted human genitals in a state of sexual stimulation, arousal or tumescence; or

3. Use of human or animal masturbation, sodomy, oral copulation, coitus, ejaculation; or

4. Fondling or touching of nude human genitals, pubic region, buttocks or female breast; or

5. Masochism, erotic or sexually oriented torture, beating or the infliction of pain; or

6. Erotic or lewd touching, fondling or other contact with an animal by a human being; or

7. Human excretion, urination, menstruation, vaginal or anal irrigation.

C. For purposes of this chapter, "specified anatomical areas" shall include the following:

1. Less than completely and opaquely covered human genitals, pubic region, buttock, and female breast below a point immediately above the top of the areola; and

2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered. (Ord. C-5487 § 1 (part), 1979: prior code § 9120.17(b)).

SECTION 21.51.030 LOCATION RESTRICTED.

A. In those land use districts where the adult entertainment businesses regulated by this chapter would otherwise be permitted uses, it shall be unlawful to establish any such adult entertainment business if the location is:

1. Within five hundred feet of any area zoned

for residential use;

2. Within one thousand feet of any other adult entertainment business; or

3. Within one thousand feet of any public or private school, park, playground, public building, church, any noncommercial establishment operated by a bona fide religious organization, or any establishment likely to be used by minors.

B. The establishment of any adult entertainment business shall include the opening of such a business as a new business, the relocation of the business, or the conversion of an existing business location to any adult entertainment business use. (Ord. C-5487 § 1 (part), 1979: prior code § 9120.17(c)).

SECTION 21.51.040 VARIANCE

A. Any property owner or his authorized agent may apply for relief from the locational provisions of this chapter by applying for a standards variance as provided in this title. To grant such a request the following additional findings must be made:

1. That the proposed use will not be contrary to the public interest or injurious to nearby properties and that the spirit and intent of this chapter will be observed;

2. That the proposed use will not enlarge or encourage the development of a skid row area;

3. That the establishment of an additional regulated use in the area will not be contrary to any program of neighborhood conservation nor will it interfere

with any program of urban renewal; and

4. That all applicable regulations of the municipal code will be observed.

B. The procedure for this hearing shall be the same as that provided for a standards variance in this title. (Ord. C-5487 § 1 (part), 1979: prior code § 9120.17(d)).

MOSK, Associate Justice, concurring and dissenting.

I

I concur in the judgment.

The majority correctly strike down the "single use" standard as unconstitutional. They err, however by jettisoning the "preponderance" standard in use for the past eight years and creating an entirely new and vague "regular and substantial course of conduct" standard. I therefore dissent from that portion of the opinion.

The majority read the decision of *Pringle v. City of Covina* (1981) 115 Cal.App.3d 151, 171 Cal.Rptr. 251, too broadly; it does not establish the preponderance standard as the limit of regulatory power for every locality in the state. Moreover, it is inappropriate to weave a new standard -- one which apparently is meant to set a statewide regulatory floor -- out of whole cloth. To do so the majority must reach out to decide this issue without the benefit of a developed record, without the benefit of briefing, and, most importantly, in contravention of the spirit of United States Supreme Court decisions that emphasize the importance of allowing cities to experiment

with various solutions to the serious problems created by urban blight. (See, e.g., *Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41, 52, 106 S.Ct. 925, 931, 89 L.Ed.2d 29 (hereafter *Renton*); *Young v. American Mini Theatres* (1976) 427 U.S. 50, 71, 96 S.Ct. 2440, 2452-2453, 49 L.Ed.2d 310 (hereafter *Young*).)

The result is judicial legislating. Creation of the "regular and substantial course of conduct" standard is unjustified because we have been presented with no evidence that the new untested standard would ameliorate the secondary effects of adult-oriented businesses while accommodating individuals' access to communications protected by the free speech provisions of the federal and state Constitutions.

II

Two interests collide when a city undertakes to pass zoning laws regulating so-called "adult entertainment businesses": (1) individuals' right to receive, and owners' right to convey, nonobscene communication protected by the state and federal Constitutions, and (2) the city's interest in eradicating urban blight. Among the more serious perceived negative secondary effects of such entertainment businesses are increased crime, particularly prostitution, deteriorating neighborhoods, and economic injury to nearby businesses. (See generally, *Developments in the Law -- Zoning* (1978) 91 Harv.L.Rev. 1427, 1551 (hereafter *Zoning*).) No one can doubt that these serious problems are a legitimate subject of local government concern. Many cities across the nation are expending considerable resources to rejuvenate long-neglected downtown areas. These efforts take a variety of forms: some cities pass zoning laws that disperse regulated uses throughout the locality; other zoning laws are aimed at

clustering the uses in limited areas; some cities regulate the operating hours and storefront advertising of so-called adult-oriented businesses; still others rely on public nuisance laws. The Supreme Court has repeatedly emphasized that courts must allow cities "'a reasonable opportunity to experiment with solutions to [these] admittedly serious problems.'" (*Renton*, supra, 475 U.S. at p. 52, 106 S.Ct. at p. 931, quoting *Young*, supra, 427 U.S. at p. 71, 96 S.Ct. at p. 2452 (plur. opn.).)

But courts must also protect individuals' rights to freedom of speech, the cornerstone of a democratic society. The federal Constitution guarantees that "Congress shall make no law . . . abridging the freedom of speech . . . ." (U.S. Const., 1st Amend.) The California Constitution declares the same right in the affirmative: "Every person may freely speak, write and publish his or her sentiments on all subjects . . . ." (Cal.Const., art. I, § 2, subd. (a).) That the communication involved here pertains to sex does not mean that it deserves less than full constitutional protection.[1] "[Sex and obscenity are not

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[1] Some commentators argue that constitutional protection should be afforded only to explicitly political speech, and not to scientific or literary speech. (see, e.g., Bork, Neutral Principles and Some First Amendment Problems (1970) 47 Ind. L.J. 1.) Justice Stevens, writing for the plurality in *Young*, suggested that "erotic materials" were not entitled to the same measure of constitutional protection as "political debate." (427 U.S. at pp. 61, 70, 96 S.Ct. at pp. 2448, 2452.) Fortunately, these views have not prevailed. (Nimmer on Freedom of Speech (1984) § 3.01.) A majority of justices in *Young* concluded that nonobscene erotic materials may not be treated differently under First Amendment principles from other forms of protected expression. (427 U.S. at p. 73, fn. 1, 96 S.Ct. at p. 2453, fn. 1 (Powell, J., concurring), pp. 85-87, 96 S.Ct. at pp. 2459-

synonymous . . . . The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." (*Roth v. United States* (1957) 354 U.S. 476, 487, 77 S.Ct. 1304, 1310, 1 L.Ed.2d 1498 fn. omitted.) These words, although written over three decades ago, still have relevance today, although to the examples must be added stage and screen presentations.

Neither of the conflicting interests, the Supreme Court has explained, is absolute. A city may, under certain circumstances, pass zoning regulations that impair the First Amendment rights of theater owners and their customers. In the seminal *Young* case, supra, 427 U.S. 50, 96 S.Ct. 2440, a sharply divided court upheld a Detroit ordinance that prohibited adult theaters from locating within 1,000 feet of any 2 other "regular uses," such as motels, liquor stores and adult bookstores, or within 500 feet of a residential area. Preliminarily, the court refused to consider a vagueness challenge to the ordinance's definition of adult motion picture: the plaintiff theater owners lacked standing to raise the challenge because they plainly intended to exhibit the type of motion pictures clearly covered by the definition, i.e., "distinguished or

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2461 (Stewart, J., dissenting, joined by Brennan, Marshall and Blackmun, JJ.).) This latter position is consonant with the state constitutional dictate that persons may speak freely "on all subjects." (Cal.Const., art. I, § 2, subd. (a).) The Oregon Supreme Court reached the same conclusion in its colorful opinion in *State v. Henry* (1987) 302 Or. 510, 525, 732 P.2d 9, 17-18.

characterized by an emphasis on" on certain listed sexual activities or anatomical areas. (Id. at p. 59, fn. 16, 96 S.Ct. at p.. 2447, fn. 16.)

Turning to the merits, the court relied on three factors in rejecting the plaintiffs' equal protection challenge. One, the ordinance did not greatly restrict access to "lawful speech." (*Young*, supra, 427 U.S. at p. 71, fn. 35, 96 S.Ct. at p. 2453, fn. 35 (plur. opn.), pp. 77, 79, 96 S.Ct. at pp. 2455, 2456 (conc. opn. of Powell, J.).) Two, the intent of the city in passing the ordinance was to ameliorate the negative secondary effects of adult entertainment businesses, not to suppress "offensive" speech. (Id. at p. 71, fn. 34, 96 S.Ct. at p. 2453, fn. 34)plur. opn.), pp. 80-81, 96 S.Ct. at pp. 2457-2458 (conc. opn. of Powell, J.).) Three, the record disclosed a factual basis for the city's conclusion that the type of restriction it imposed would have the desired effect. (Id. at p. 71, 96 S.Ct. at p. 2452 (plur. opn.), p. 82, 96 S.Ct. at p. 2458 (conc. opn. of Powell, J.).)

In dictum, a majority of this court now create a new standard that does violence to both free speech principles and cities' interest in tailoring zoning regulations to local circumstances. If the "regular and substantial course of conduct" standard were adopted by a legislative body in the same unstudied manner as it is suggested by the majority, courts would be required to strike it down because it fails to meet the *Young* criteria. Because the case comes to us on demurrer there is no evidence in the record that the new standard would allow substantially unimpeded access to protected speech. Moreover, there is absolutely no factual basis for the majority's surmise that a "regular and substantial course of conduct" standard will substantially assist Long Beach or any other city to fight urban blight.

In most cases, courts are not required to examine the legislative record or to inquire into legislator's motives when reviewing a statute or ordinance. When the legislation impairs the right to freedom of speech, however, "courts should continue to undertake more than a cursory, deferential examination of the factual bases of the municipality's decision. Courts sensitive to the first amendment issues at stake should insist upon a fairly complete record of the evidence available to municipal legislators at the time they acted and of the facts on which they relied . . . ." (*Zoning*, op. cit. supra, 91 Harv.L.Rev. at p. 1559; see also *Schad v. Mount Ephraim* (1981) 452 U.S. 61, 69-70, 101 S.Ct. 2176, 2183-2184, 68 L.Ed.2d 671.) In *Christy v. City of Ann Arbor* (6th Cir. 1987) 824 F.2d 489, certiorari denied (1988) ___ U.S. ___, 108 S.Ct. 1013, 98 L.Ed.2d 978, the court examined an ordinance that defined an adult bookstore as an establishment having as a "principal activity" the sale of books or films characterized by an emphasis on certain enumerated sexual activities. "Principal activity" was in turn defined as a "use accounting for more than 20 per cent of a business." The court of appeals vacated the district court's order denying the plaintiff bookseller's motion for preliminary injunction and remanded the case for further proceedings.

After carefully examining the record, the court of appeals held, "Although both the Supreme Court in *Renton*, 106 S.Ct. at 931, and the Sixth Circuit in *CLR [Corp.] v. Henline* [6th Cir. 1983] 702 F.2d [637] at 639, have stated that a city need not conduct new independent studies to justify adult business zoning ordinances, both courts have required *some relevant evidence* to demonstrate that the zoning ordinance was intended to address the secondary effects of adult businesses. The burden of proof is on the city to show that more than a

rational relationship exists between the ordinance and this government interest. [Citation.] In the case at hand, the district court's opinion notes only that the city 'has asserted that its purpose in passing this ordinance is to prevent the concentration of adult businesses and resultant urban blight.' [Citation.] Upon careful review of the record in this case, we find no such 'assertion,' nor do we find *any evidence* of a legitimate government objective for the passage of this zoning ordinance." (*Christy v. City of Ann Arbor*, supra, 824 F.2d at p. 493, italics added.)

If a legislative body is constitutionally prohibited from zoning adult entertainment businesses absent findings that the ordinance is directed to ameliorating secondary effects, then a fortiori this court may not "legislate" a new standard absent a record from which it can be fairly inferred that such a standard will substantially serve the government objective.

The majority's incursion into the legislative realm is as unnecessary as it is mischievous. The majority complain that "[t]he exact basis of the *Pringle* decision is not entirely clear" while suggesting that it sets a constitutionally based regulatory floor for all localities in the state, i.e., that no city may constitutionally define an adult motion picture theater as a building used to exhibit anything less than 50 percent adult films, no matter what evidence is presented to the legislative body. (Maj. opn., *ante*, at p. 747, fn. 8 and p. 748, fn. 10 of 259 Cal.Rptr., at p. 776, fn 8 and p. 777, fn. 10 of 774 P.2d.) To the contrary, *Pringle*, supra, 115 Cal.App.3d 151, 171 Cal.Rptr. 251, did not purport to hold that its preponderance standard represented any sort of constitutional floor for adult entertainment zoning ordinances in general or that a local entity was precluded from adopting any definition of an adult theater that was

more restrictive than the preponderance standard.

Indeed, two Court of Appeal decisions cited by the majority make this point very clear. In *Kuhns v. Board of Supervisors* (1982) 128 Cal.App.3d 369, 181 Cal.Rptr. 1, decided just one year after *Pringle*, the Court of Appeal applied the predominance standard in defining the proportion of a bookstore's stock that would render the store an "adult bookstore" for purposed of a similar zoning ordinance, but at the same time explicitly recognized that a local legislative body retained the authority to adopt an alternative standard, stating: "If the board of supervisors intended to allow a lesser portion it behooves them to quantify the phrase and make findings showing their figure is consonant with the governmental interest being protected." (128 Cal.App.3d at p. 376, 181 Cal.Rptr. 1.) And in *Strand Property Corp. v. Municipal Court* (1983) 148 Cal.App.3d 882, 200 Cal. Rptr. 47, the Court of Appeal, while applying the *Pringle* standard to the version of a San Diego adult entertainment zoning ordinance before it, noted that the city council had amended the ordinance after the suit in that case had been filed to define an adult motion picture theater as a theater that presents sexually explicit films or shows "for viewing on more than 7 days within any 56-consecutive-day period," and stated approvingly that while "this provision is not in issue here, . . . we may observe it operates in aid of the Code's certainty." (148 Cal.App.3d at p. 889, fn. 9, 200 Cal.Rptr. 47.)

Thus, *Pringle*, supra, 115 Cal.App.3d 151, 171 Cal.Rptr. 251, should not be, nor has it been interpreted as preventing a city from holding public hearings and examining studies, based either on its own or other cities' experiences, and enacting an ordinance that explicitly defines adult motion picture theaters as those exhibiting

numerically more or less than a preponderance of adult films. At that point, a city may be in the correct posture to raise the claims Long Beach attempts to litigate in this case.

That the majority's "regular and substantial course of conduct" standard is vague and untailored to the governmental interest at stake is hardly surprising. It does not appear in the parties' briefs, in decisions of the courts below, or indeed, in any of the reported cases in this state. While, we cannot insist on "celestial precision," as the majority put it, because the ordinance touches on free speech rights and because violation of the ordinance can subject a theater owner to criminal penalties, both the locality's interests and constitutional values would be better served by a more precise definition of "adult motion picture theater" -- (see, e.g., *Strand Property Corp. v. Municipal Court*, supra, 148 Cal.App.3d 882, 889, 200 Cal.Rptr. 47) -- that is, a definition that can be understood and easily applied by all parties without engendering endless court controversy and without deterring constitutionally protected speech that poses no substantial danger of adverse secondary effects. The choice among a variety of reasonable, alternative standards that could be used to define an "adult motion picture theater" is clearly a legislative policy decision. The appropriate legislative body, not this court, is in the best position to assess the circumstances likely to create adverse secondary effects in its own community.

III

I must acknowledge that I share the majority's concern that the preponderance test *might* result in too high a standard. The solution, however, is not to invent a "regular and substantial course of conduct" standard, of

dubious context and unsupported by legislative findings. To do so is to usurp the legislative role. In my view the proper course is to allow municipalities, which "often employ planning experts who can prepare studies of the probable effects of a proposed zoning ordinance" (*Zoning*, op. cit. supra, 91 Harv.L.Rev. at p. 1560), to analyze, to consider and possibly to experiment with various standards and, most importantly, to create a record for judicial review. If an ordinance based on such a record is thereafter challenged, we would have a sound basis for determining whether the standard violates free speech principles.[2]

KENNARD, Associate Justice,
concurring and dissenting.

I.

I concur in the majority's conclusion that the Long Beach adult entertainment zoning ordinance at issue here cannot properly be interpreted to classify a theater as an "adult motion picture theater" within the meaning of the ordinance (Long Beach Mun. Code, § 21.51.020, subd.

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[2] It appears that the majority do not propose that their new standard should be applied retroactively to these defendants (see maj. opn., *ante*, at p. 748, fn. 11 of 259 Cal.Rptr., at p. 777, fn. 11 of 774 P.2d). Criminal prosecution based on the past conduct of defendants -- like the theater owners in this case -- who may well have conducted their theater's operations in reliance both on the *Pringle* decision and on subsequent California cases that followed *Pringle*, would undoubtedly raise serious ex post facto problems.

A.2.)[1] solely on the basis of the theater's single showing of a sexually explicit film. This conclusion would follow even under ordinary principles of statutory interpretation, without resort to constitutional considerations.

The ordinance in question is a zoning ordinance, not an obscenity ordinance. As the United States Supreme Court said in *Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41, 47, 106 S.Ct. 925, 929, 89 L.Ed.2d 29, such an ordinance "is aimed not at the *content* of the films shown at 'adult motion picture theaters,' but rather at the *secondary effects* of such theaters on the surrounding community." (Emphasis in original.)

"[It] is difficult to imagine that only a single showing ever, or only one in a year would have any meaningful secondary effects" on the community surrounding a motion picture theater. (*Tollis, Inc. v. San Bernardino County* (9th Cir. 1987) 827 F.2d 1329, 1333.) Therefore, it would not be reasonable to ascribe to the drafters of the Long Beach ordinance an intent to include a theater within the ordinance's "adult motion picture theater" category on the basis of a single showing of a sexually explicit film, particularly in the absence of any indication on the face of the ordinance or any legislative history suggesting such an intent. Thus, I concur in the majority's rejection of the city's contention that the

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[1] Section 21.51.020 provides in relevant part: "A. For purposes of this chapter, the adult entertainment businesses are defined as follows: " . . ."

2. 'Adult motion picture theater' means an enclosed building with a capacity of fifty or more persons used for presenting material distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas for observation by patrons therein."

ordinance embodies a "single use" standard.

II.

Like Justice Mosk, however, I cannot join in that portion of the majority opinion which goes beyond the city's "single use" contention and undertakes to fashion an entirely new standard for defining an "adult motion picture theater" for purposes of the Long Beach ordinance. In so doing, the majority discards the Court of Appeal's interpretation of a virtually identical provision in *Pringle v. City of Covina* (1981) 115 Cal.App.3d 151, 171 Cal.Rptr. 251. This venture by the majority is, in my view, unwarranted.

In *Pringle*, the appellate court construed the challenged adult entertainment zoning ordinance as applying only to theaters which showed "a preponderance" of sexually explicit films. Other appellate courts have followed *Pringle* in interpreting similar zoning ordinances which did not contain a precise or definite standard for determining whether a theater or bookstore fell within the reach of the ordinance. (See, e.g., *Kuhns v. Board of Supervisors* (1982) 128 Cal.App.3d 369, 376, 181 Cal.Rptr. 1; *Strand Property Corp. v. Municipal Court* (1983) 148 Cal.App.3d 882, 889-890, 200 Cal.Rptr. 47.)

During oral argument in this case, counsel for the city was asked several times whether, in the event the court disagreed with his "single use" contention, he was urging the court to interpret the ordinance as embodying some from of intermediate standard between a "single use" standard and *Pringle*'s "preponderance" standard. Counsel responded he was going "for broke," and he did in fact argue only for a "single use" standard. Under these circumstances, we should not devise a compromise

interpretation of our own design.

Also, in reaching out to overturn *Pringle*, supra, 115 Cal.App.3d 151, 171 Cal.Rptr. 251, the majority opinion ignores the fact that, in the span of eight years since that decision, the City of Long Beach has taken no action to modify the *Pringle* test. If, in the city's view, the "preponderance" standard is too easily evaded and does not adequately identify those theaters which produce detrimental secondary effects on the surrounding neighborhoods in its community, the city could have amended the language of its zoning ordinance to adopt an alternative, more stringent definition of adult theaters.[2] Both *Kuhns* and *Strand*, which were decided in 1982 and 1983, hold that a locality is free to adopt an alternative to the preponderance standard. (See *Kuhns*, supra, 128 Cal.App.3d at p. 376, 181 Cal.Rptr. 1; *Strand, supra*, 148 Cal.App.3d at p. 889, 200 Cal.Rptr. 47.) Indeed, the *Strand* decision specifically noted that the city of San Diego had opted for this approach in September of 1982,

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[2] Contrary to the implication in the majority opinion (see *ante*, p. 747 & fn. 8 of 259 Cal. Rptr., p. 776 & fn. 8 of 774 P.2d), there is nothing in *Pringle* which suggests that its "preponderance" standard represented any sort of constitutional "floor" for adult entertainment zoning ordinances in general. Although the *Pringle* court did hold that the term "used" in the ordinance at issue in that case could not constitutionally be interpreted to mean a "single use" (*Pringle, supra*, 115 Cal.App.3d at pp. 161-162, 171 Cal.Rptr. 251), the court did not in any way intimate that local entities were constitutionally prohibited from adopting any definition of an adult theater that was more restrictive than a preponderance standard. And, as noted hereafter in the body of my concurring and dissenting opinion, other courts have not interpreted *Pringle* as adopting such a restriction.

when it amended its adult entertainment zoning ordinance to specifically define an adult theater as one which exhibits the described type of sexually explicit films "'on more than 7 days within any 56-consecutive-day period.'" (See *Strand*, supra, 148 Cal.App.3d at p. 889, fn. 9, 200 Cal.Rptr. 47.)

Here, in discarding *Pringle*'s "preponderance" standard, the majority opinion fails to give adequate deference to the city's legislative prerogative.

Finally, there is an additional reason why we should leave to the city's legislative body the task of modifying the *Pringle* test. Under the somewhat indefinite "regular and substantial course of conduct" standard proposed by the majority, an ordinary theater (see, e.g., *Pringle*, supra, 115 Cal.App.3d at p. 153 & fn. 1, 171 Cal.Rptr. 251), which in good faith wished to comply with the law, may have difficulty in determining whether it may show a popular, nonobscene -- but sexually explicit -- film once a week, once a month, or even once every two months without facing criminal charges of having turned its theater into a prohibited "adult motion picture theater." Even if the majority's proposed standard is sufficiently definite to survive a constitutional vagueness challenge -- a question on which I would reserve judgment -- it still appears unwise to thrust such a standard on a locality which has not itself opted for such an opaque definition. As Justice Mosk observes, such a standard will inevitably engender "endless court controversy" (see ante, p. 753 of 259 Cal.Rptr., p. 782 of 774 P.2d) as to how many films must be shown over what period of time to satisfy the "regular and substantial course of conduct" test. Such litigation would ill-serve not only the administrative and financial interests of the locality but also the legitimate constitutional interests of theater owners and

theater patrons.

There are numerous methods by which a city could reasonably define the category of theaters whose presence is likely to have detrimental secondary effects on the surrounding community without creating the enforcement problems which are likely to arise under the majority's view. For instance, a city could define such a theater by reference to (1) the proportion of the theater's films which are sexually explicit, (2) the number of sexually explicit films which are shown at the theater each week, each weekend or each month, (3) the nature of the films which receive top billing on the theater's marquee or in its advertisements, or (4) the percentage of the theater's revenues which are attributable to the showing of sexually explicit films.

A local legislative body is better equipped than this court to determine, in light of local conditions, how best to identify those theaters which are likely to become a "blight" on the local community, and to frame a definition which local authorities can enforce and which will provide adequate guidance to those who wish to comply with the law.[3]

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[3] Unlike Justice Mosk, I do not read the governing federal decisions as requiring a local entity to point to specific empirical evidence to support its choice of one particular definition of "adult theater" over another. The lead opinion in *Young v. American Mini Theatres* (1976) 427 U.S. 50, 71, 96 S.Ct. 2440, 2453, 49 L.Ed.2d 310, makes it clear that a city "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." Of course, any definition which is chosen must not be "'a pretext for suppressing expression'" (see *Renton, supra*, 475 U.S. at p. 54, 106 S.Ct. at p. 932 [quoting *Young, supra*, 427 U.S. at p. 84, 96 S.Ct. at p.

Accordingly, although I concur in the majority's rejection of the city's "single use" contention and in the affirmance of the Court of Appeal judgment, I respectfully dissent from the majority opinion insofar as it ventures beyond the city's "single use" claim.

BROUSSARD, J., concurs.

2459 (Powell, J. conc.)]), but must be selected as a reasonable means of protecting the community from adverse secondary effects.

APPENDIX # 2

(Lucero II)

Lucero v. Municipal Court (People)
(1993) 15 Cal.App.4th 784
[19 Cal.Rptr.2d 143]--"depublished"
by order of the California Supreme
Court August 12, 1993

Jose Ronillo Abogado LUCERO, Jimmie Johnson, Walnut Properties, Inc., a California Corporation, Petitioners and Respondents

v.

MUNICIPAL COURT OF the LONG BEACH JUDICIAL DISTRICT, County of Los Angeles, State of California, Defendants.

PEOPLE of the State of California, Real Party in Interest and Appellant.

No. B050440.

Court of Appeal, Second District, Division 7.

May 7, 1993.

The Superior Court, Los Angeles Count, No. C715969, Jack M. Newman, J., awarded theater owners attorney's fees and costs under § 1988 as prevailing parties in writ proceedings to restrain criminal prosecution brought by city in violation of their constitutional rights. City appealed. The Court of Appeal, Johnson, J., held that: (1) theater owners were prevailing parties in proceeding to vindicate their civil rights for purposes of award of fees; (2) immunity did not shield city from paying fee award; (3) city was real party in interest to be held responsible for fee award even though city was not named in pleadings; and (4) award of fees under § 1988 was proper in action to restrain unconstitutional criminal proceedings.

Affirmed.

John A. Vander Lans, Long Beach City Prosecutor, Robert R. Recknagel, Asst. City Prosecutor, and Gerry L. Ensley, Deputy City Prosecutor, for real party in interest and appellant.

Fleishman, Fisher & Moest, Stanley Fleishman and David Grosz, Los Angeles, for petitioners and respondents.

Ira Reiner and Gil Garcetti, Dist. Attys. of Los Angeles County, Harry B. Sondheim, Head Deputy Dist. Atty., and Diana L. Summerhayes, Deputy Dist. Atty., for amicus curiae Appellate Committee of California Dist. Attys. Ass'n.

JOHNSON, Associate Justice.

The City of Long Beach appeals from an order of the superior court awarding respondents attorney fees and costs as prevailing parties in an action to restrain a criminal prosecution brought by the City in violation of their constitutional rights. We affirm.

FACTS AND PROCEEDINGS BELOW

Respondents, Jose Ronillo Abogado Lucero, Jimmie Johnson and Walnut Properties, Inc. (respondents), owned, operated or worked at the Lakewood Theater in the City of Long Beach. Some of the films shown at the theater were X-rated adult movies. In 1977 the City of Long Beach (City) adopted a "non-cluster" or "anti-skid row" ordinance prohibiting any adult entertainment business within 500 feet of residential areas or 1,000 feet of public schools or churches. (Long Beach Mun.Code, ch. 21.51.)

In December 1977, and shortly after the Lakewood Theater opened, the City instituted proceedings culminating in the revocation of Walnut Properties, Inc.'s (Walnut) operating license. Walnut sued the City to challenge the constitutionality of the ordinance. (*Walnut Properties v. City Council of Long Beach* (1980) 100 Cal.App.3d 1018, 1024, 161 Cal.Rptr. 411.) The Court of Appeal upheld the constitutionality of the ordinance and affirmed Walnut's misdemeanor convictions for operating an adult entertainment business in violation of the Long Beach ordinance.

Walnut thereafter reduced the number of adult movies shown at the theater to something at or under 50 percent. Based on a then recent Court of Appeal decision interpreting the constitutionality of zoning restrictions on adult entertainment, a theater could not be regulated as adult entertainment unless a "preponderance" of the films exhibited were of the adult variety. (*Pringle v. City of Covina* (1981) 115 Cal.App.3d 151, 171 Cal.Rptr. 251) "Preponderant use" of an adult theater was thereafter defined as "over 50 percent." (*Strand Property Corp. v. Municipal Court* (1983) 148 Cal.App.3d 882, 889, 200 Cal.Rptr. 47.)

Nevertheless, the City attempted to prosecute Walnut and others for probation violations based on a single showing of an adult film. Walnut filed suit for declaratory and injunctive relief against the city council and the city prosecutor alleging the rights under 42 United Stated Code section 1983 and *Pringle*. Walnut successfully sought an injunction to restrain the criminal proceedings as well as attorney fees under 42 United Stated Code section 1988. On appeal, the City contended Pringle was *wrongly decided* and that a single showing of an adult film should be sufficient under the first

amendment to violate its ordinance. The Court of Appeal agreed it was constitutionally permissible to regulate a theater showing a single adult film and reversed the judgment and award of fees. (*Walnut Properties, Inc. v. Ussery* (1986 178 Cal.App.3d 186, 223 Cal.Rptr. 511 [opinion ordered not published in the Official Reports by order of the Supreme Court dated June 24, 1986 (B005781)].)

In September 1987, the Long Beach City Prosecutor charged respondents with 12 counts each of violation the City ordinance. Each count of the complaint was predicated upon a single showing of an adult movie on a specific date. Although aware the decision in *Ussery* was deprived of precedential value due to the decision's depublication, and that the "predominant use" of the Lakewood theater was not the exhibition of adult films and therefore did not violate the ordinance as interpreted under *Pringle*, the City filed the complaints to directly challenge *Pringle*'s "predominate use" standard.

Respondents demurred to the complaints contending they could not be prosecuted based on an unconstitutional interpretation of the Long Beach Zoning Ordinance, i.e., based on a single showing of an adult film. The Municipal Court of Long Beach overruled the demurrers and set the case for trial.

Respondents sought a writ of prohibition or mandate to compel the municipal court to sustain the demurrers and dismiss the complaints. Respondents stated the petition was brought pursuant to 42 United States Code section 1983, because the present prosecution, brought under color of state law, would deprive them of their rights under the First and Fourteenth Amendments as guaranteed by the

Constitution of the United States.

The superior court granted a peremptory writ of mandate commanding the municipal court to grant the demurrers with 30 days leave for the real party in interest to file amended complaints. In its order the court explained that "the proceedings against petitioners under the allegations of the complaints filed in the respondent court subject the petitioners to a deprivation of rights secured by the first and fourteenth amendments to the United States Constitution. . . . ."

The City's prosecutors refused to amend the complaints and instead petitioned the Court of Appeal for a writ of mandate to compel the superior court to vacate its judgment.

The Court of Appeal denied the writ and rejected the City's contention a single showing of an adult film was constitutionally sufficient to make a theater an adult motion picture theater within the meaning of the City's zoning ordinance. The court denied the City's petition for writ of mandate because the complaints did not and could not allege, as required by the decision in *Pringle*, that the preponderance of films exhibited were distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specific anatomical areas as those terms are defined in the Long Beach Municipal Code. The Supreme Court granted the City's petition for review of the constitutionality of the City's "single use" standard.

The Supreme Court found the "single use" standard violated the first amendment. The court also found, however, the *Pringle* "predominate use" standard was unnecessarily high and was not constitutionally compelled. The court rejected both the "single use" and *Pringle*

standards for defining the conditions under which a theater may be permissibly regulated as an adult theater and adopted instead a "regular and substantial course of conduct" standard. (*People v. Superior Court (Lucero)* (1989) 49 Cal.3d 14, 27, 259 Cal.Rptr. 740, 774 P.2d 769.) The court concluded that "The People, having alleged multiple violations of Chapter 21.51, section 21.51.030 of the Long Beach Municipal Code, each based on the unconstitutional 'single use' standard, are not entitled to proceed with the action as pleaded. Accordingly, the judgment of the Court of Appeal [denying the City's petition for writ of mandate to reinstate the complaint] is affirmed." (49 Cal.3d at p. 28, 259 Cal.Rptr. 740, 774 P.2d 769.) The court concluded that "The People, having alleged multiple violations of Chapter 21.51, section 21.51.030 of the Long Beach Municipal Code, each based on the unconstitutional 'single use' standard, are not entitled to proceed with the action as pleaded. Accordingly, the judgment of the Court of Appeal [denying the City's petition for writ of mandate to reinstate the complaint] is affirmed." (49 Cal.3d at p. 28, 259 Cal.Rptr. 740, 774 P.2d 769.)

Thereafter respondents filed a motion for an award of attorney fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976. (42 U.S.C., § 1988.) After extensive briefing and argument from the parties, the superior court awarded respondents $35,000 in fees and $1,773 in costs to be paid by real party in interest, the City of Long Beach. The City appeals from the order, asserting the award is inappropriate as a matter of law in numerous respects.

DISCUSSION

I. RESPONDENTS WERE THE PREVAILING PARTIES IN THE PROCEEDINGS TO VINDICATE THEIR CIVIL RIGHTS.

[1] The City contends respondents are not entitled to attorney's fees because they received only a technical victory concerning the pleadings and did not receive any relief on the merits. The city argues because respondents could not be prosecuted under the *Pringle* "predominate use" theory, and could not be prosecuted on a "single use" theory, there has been no legal change between the parties to qualify respondents as the prevailing parties.

The leading case defining who can be deemed a "prevailing party" in a civil rights action, and therefore who is entitled to an award of fees under section 1988, is *Texas State Teachers Assn. v. Garland Independent School Dist.* (1989) 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866.[1] In that case the Court was asked to determine

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[1] 42 United States Code section 1983, the relevant civil rights statute, provides in pertinent part:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state . . .subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ."

42 United States Code section 1988, the Civil Rights Attorney's Fees Awards Act, provides in pertinent part:

"In any action or proceeding to enforce a provision of § [] (1983), the Court, in its discretion, may allow the prevailing party . . . a

whether the teachers association could be deemed to be the prevailing party in the action although some of its claims were dismissed. The Court examined its decisions defining "prevailing parties" in varying contexts and determined "[i]f the plaintiff has succeeded on any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit the plaintiff has crossed the threshold to a fee award of some kind . . . As we noted there, [r]espect for ordinary language required that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail. Thus, at a minimum, to be considered a prevailing party within the meaning of § 1988 the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant . . . The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sough to promote in the fee statute. Where such a change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)] not to the availability of a fee award *vel non*." (489 U.S. at pp. 791-793, 109 S.Ct. at pp. 1492-1494, internal citations and quotation marks omitted.)

In this case the writ proceeding brought by respondents changed the legal relationship between the parties. Respondents sought a writ of prohibition or mandate to prevent any prosecution based on the unconstitutional charges. At the termination of all the

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reasonable attorney's fee . . . ."

All further statutory references are to Title 42 of the United States Code unless otherwise indicated.

writ proceedings, our Supreme Court issued its decision restraining the criminal prosecution. Thus, where once respondents were defendants threatened with a prosecution for alleged violations of a Long Beach Municipal Ordinance, at the end they were freed from having to defend against the unconstitutional charges.

Furthermore, respondents received some relief on the merits of their claim. Their petition for writ of prohibition or mandate alleged the criminal prosecutions would violate their rights under the First and fourteenth Amendments of the United States Constitution. The superior court, Court of Appeal and Supreme court agreed and the prosecution was restrained.[2]

It is true the City also received some benefit from the litigation in that the more stringent *Pringle* standard has now been replaced by a more lenient "regular and substantial course of conduct" standard for determining when an adult theater may be constitutionally regulated. However, that incidental, alleged benefit for prosecutors generally is irrelevant to the inquiry whether respondents, as the parties that pursued the writ proceedings pursuant to section 1983, were successful in restraining a

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[2] Based on the Supreme Court's conclusion, we reject the City's contention no court found respondent's constitutional rights had been violated.

Also, based on the plain and unambiguous language used in the petition, we reject the City's contention it had inadequate notice the writ was sought pursuant to section 198 and that it could, therefore, be liable for fees under section 1988. (See *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit* (1993) --- U.S. ---, 113 S.Ct. 1160, 122 L.Ed.2d 517 [there is no heightened pleading standard in civil rights actions].)

prosecution based on the City's unconstitutional standard of "single use."

II. NO IMMUNITY SHIELDS THE CITY FROM PAYING A FEE AWARD UNDER SECTION 1988 BECAUSE RESPONDENTS BROUGHT AN ACTION FOR PROSPECTIVE RELIEF UNDER SECTION 1983.

Relying on the decision in *Imbler v. Pachtman* (1976) 424 U.S. 409, 95 S.Ct. 984, 47 L.Ed.2d 128, the Long Beach City Prosecutor contends the award of fees was improper because prosecutors enjoy absolute immunity for actions taken in the official exercise of their discretion. The City contends if the prosecutor's office is immune from section 1983 liability there can be no fee shifting under section 1988.

This argument is inapplicable to the case at bar. *Imbler* provides absolute immunity to state prosecutors from personal liability in damages for malicious prosecution. Nor was the underlying action brought against the Long Beach City Prosecutors individually.

[2] Moreover, the doctrine of prosecutorial immunity is inapplicable in actions for prospective relief where the liability of the municipality for violations of civil rights is at issue and not that of the official personally (*Owen v. City of Independence* (1980) 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673) and where the fee award is to be paid by the governmental entity (*Hutto v. Finney* (1978) 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522). (See also *Kentucky v. Graham* (1985) 473 U.S. 159, 167, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 [in suit against municipal

officers personally, city cannot be held liable on respondeat superior theory although that defense unavailable where officials sued in official capacity.])

[3] In *Supreme Court of Virginia v. Consumers Union of the United States, Inc.* (1980) 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641, the Court held the Virginia court could be held liable for an award of fees under section 1988 in their role as the enforcement agents of the state bar rules. In so holding the Court noted "[p]rosecutors enjoy absolute immunity from damages liability, but they are natural targets for § 1983 injunctive suits since they are the state officers who are threatening to enforce and who are enforcing the law." (*Id.* at pp. 736-737, 100 S.Ct. at p. 1977, internal citation omitted.) After reviewing the cases holding the Eleventh Amendment did not bar an award of attorney fees against a state officer in his or her official capacity in a suit for injunctive relief in federal court (*Hutto v. Finney*, supra, 437 U.S. 678, 693-700, 98 S.Ct. 2565, 2574-2579), the court stated: "Accordingly, enforcement authorities against whom § 1983 judgments have been entered would ordinarily be charged with attorney's fees." (446 U.S. at p. 738, 100 S.Ct. at p. 1977.)[3]

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[3] The City suggests other bases for immunity from an award of attorney's fees. These contentions, however, have no merit. The Eleventh Amendment provides no immunity for an action brought in state court, especially where the liability of a municipality, and not a state, is at issue. Secondly, as the City concedes, state common law and statutory immunities do not pertain to a civil rights action brought under federal law. (See, e.g., Gov.Code, § 821.6; *Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 246 Cal.Rptr. 609.)

Contrary to the arguments of the City, the fee award against the City was proper because the writ proceeding in the present case was not an action for damages but was instead tantamount to a suit for declaratory or injunctive relief. As noted by one commentator: "Where the statute or ordinance is unconstitutional, there is no legally punishable offense, and the court has no jurisdiction to try the defendant. In such a case, a higher court will grant the equivalent of an injunction, namely a *writ of prohibition* to prevent the *lower court* from trying the defendant." (4 Witkin & Epstein Cal.Criminal Law (2d ed. 1989) Jurisdiction and Venue, § 1831, p. 2168, emphasis in original; see also, *Rescue Army v. Municipal Court* (1946) 28 Cal.2d 460, 171 P.2d 8 [writ of prohibition proper vehicle to restrain prosecution based on unconstitutional statute]; *Patterson v. Municipal Court* (1965) 232 Cal.App.2d 289, 42 Cal.Rptr. 769 [prohibition to compel trial court to properly instruct on and give issue to the jury].)

Because the writ proceeding in the present case sought to restrain the unconstitutional criminal prosecutions, the proceeding was sufficiently akin to a suit for declaratory or injunctive relief to warrant an award of fees against the City for the unconstitutional actions of its enforcement officials.[4]

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[4] Because the present proceedings requested only prospective relief from the unconstitutional prosecution, we reject the City's argument respondents are not entitled to fees because they did not plead and prove damages and did not request findings of fact or conclusions of law regarding the City's history, custom and policy regarding its decision to construe its ordinance to be violated upon a single exhibition of an adult motion picture. In these proceedings, where the relief sought was to restrain the illegal criminal

III. RESPONSIBILITY FOR PAYING THE FEE AWARD MAY PROPERLY BE PLACED ON THE CITY ALTHOUGH NOT NAMED IN THE PLEADINGS.

[4] The City next contends the fee award against it was improper because only the People of the State of California were named as the real party in interest in the writ proceedings.[5]

However, it is sufficient if the course of the

---

prosecution pursuant to section 1983, it was only necessary to demonstrate the City's prosecutor, under color of state authority, consciously decided to prosecute respondents based on a single showing of an adult movie and that the City's standard was constitutionally impermissible. (*Gomez v. Toledo* (1980) 446 U.S. 635, 640, 100 S.Ct. 1920, 1923, 64 L.Ed.2d 572.)

Any argument respondents failed to prove these elements, or that the City had not adopted as its policy the "single use" standard, would be disingenuous at best. As Justice Kennard noted in her concurring and dissenting opinion in *People v. Superior Court (Lucero), supra*, 49 Cal.3d at p. 35, 259 Cal.Rptr. 740, 774 P.2d 769, "During oral argument in this case, counsel for the city was asked several times whether, in the event the court disagreed with his 'single use' contention, he was urging the court to interpret the ordinance as embodying some form of intermediate standard between a 'single use' standard and *Pringle's* 'preponderance' standard. Counsel responded he was going 'for broke", and he did in fact argue only for a 'single use" standard."

[5] When the city prosecutor's office prosecutes misdemeanors committed within its jurisdictional territory, by statute it must do so in the name of the People of the State of California. (Gov.Code, §§ 36900, subd. (a), 41803.5.)

proceedings reveal the real party in interest for purposes of identifying the individual or entity against whom a fee award may be made. As the Court stated in *Brandon v. Holt* (1985) 469 U.S. 464, 471-472, 105 S.Ct. 873, 877-878, 83 L.Ed.2d 878: "In at least three recent cases arising under § 1983, we have plainly implied that a judgment against a public servant "in his official capacity' imposes liability on the entity that he represents provided, of course, the public entity received notice and an opportunity to respond. We now make that point explicit." Thus, in *Brandon v. Holt* the Court held the city was responsible for paying the attorney fees awarded to the prevailing plaintiffs in a section 1983 action against the city's director of police sued in his official capacity. (*Id.* at p. 471, 105 S.Ct. at p. 877.)

In *Hutto v. Finney*, supra, 437 U.S. 678, 98 S.Ct. 2565, the Court rejected the state attorney general's argument the state could not be responsible for attorney fees under section 1988 based on an action for injunctive relief where prison officials were the named defendants. "[T]he Attorney General argues that, even if attorney's fees may be awarded against a State, they should not be awarded in this case, because neither the State nor the Department is expressly named as a defendant. Although the Eleventh Amendment prevented respondents from suing the State by name, their injunctive suit against prison officials was, for all practical purposes, brought against the State. The actions of the Attorney General himself show that. His office has defended this action since it began. [Citation] The State apparently paid earlier fee awards; and it was the State's lawyers who decided to bring this appeal, thereby risking another award.

"Like the Attorney General, Congress recognized

that suits brought against individual officers for injunctive relief are for all practical purposes suits against the State itself. The legislative history makes it clear that in such suits attorney's fee awards should generally be obtained 'either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (*whether or not the agency or government is a named party*).' S.Rep. No. 94-1011, p. (1976)." *(Hutto v. Finney*, supra, 437 U.S. at pp. 699-700, 98 S.Ct. at p. 2578, italics added.)

Thus, whether or not the City was named as a real party in interest in this action is not determinative in ascertaining which person or entity should be responsible for the fees in this case. What is determinative is whether the course of proceedings reveal the real party in interest and whether that party had adequate notice of the suit and an opportunity to defend.

All the criteria for imposing the fee award against the City of Long Beach area met in this case. The entire controversy concerned the enforcement of Long Beach's zoning ordinance. The "singe use" standard was the city prosecutor's interpretation of the City ordinances. The city prosecutor's office has defended the ordinance and represented the City's interests in all proceedings at every level. The city prosecutor in fact brought this appeal to challenge the award of fees imposed against the City.

From this record it is clear the City had adequate notice of the proceedings and has had its interests represented throughout. The trial court found, and we agree, the City of Long Beach was the real party in interest in these proceedings to defend its ordinance. Under these circumstances, we find no violation of due process in requiring the Cit as the real party in interest in

this action to pay the award of attorney fees and costs.

IV. SECTION 1988 ATTORNEY'S FEE AWARDS MAY BE PROPERLY AWARDED IN ACTIONS TO RESTRAIN UNCONSTITUTIONAL CRIMINAL PROCEEDINGS.

[5] Amicus curiae suggests an award of attorney fees is improper when awarded in a proceeding which is part of a criminal prosecution. The argument, apparently, is that criminal defendants should not be allowed to bootstrap a civil proceeding which carries with it a potential for an award of fees into a criminal prosecution. Amicus curiae does not cite any relevant authority for this proposition. Nor do we see anything inherently improper in this process.

Apparently amicus curiae would prefer a criminal defendant to pursue his or her remedies in the criminal action and then later or simultaneously file a separate civil action under section 1983 for the civil rights violations inflicted in the criminal proceeding. We fail to see how a multiplicity of suits to accomplish the same objective can possible benefit either defendants, the justice system or further the congressional purpose of providing an effective statutory vehicle to vindicate civil rights secured by the Constitution. (See, e.g., *Lezama v. Justice Court* (1987) 190 Cal.App. 3d 15, 24, 235 Cal.Rptr. 238 [to be entitled to fees under section 1988, criminal defendants should pursue available remedies in the original proceeding].)

We agree an award of fees under section 1988 may not be proper for the fees and costs incurred in defending a criminal prosecution. (*Perkins v. Cross* (8th Cir.1984) 728 F.2d 1099; *Greer v. Holt* (6th Cir.1983) 718 F.2d 206.)

However the fees in this case were neither incurred nor awarded for that purpose. In this case there was no actual prosecution to try the alleged charges. Consequently, there were no fees or costs incurred in defending against the improper charges. The purpose of these proceedings was not to secure or defend against a conviction but rather to restrain an unconstitutional prosecution before it could begin.

[6, 7] In any event, the language of section 1988 does not limit an award of fees to separately filed civil actions only. As the Supreme Court noted in *Hutto v. Finney*, supra, 437 U.S. at p. 694, 98 S.Ct. at p. 2575: "The Act itself could not be broader. It applies to 'any' action brought to enforce certain civil rights laws." The legislative history of The Civil Rights Attorney's Fees Awards Act of 1976 supports a broad interpretation as well. The Senate Report on the Act states: "It is intended that, the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statues covered by S. 2278, if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' *Newman v. Piggie Park Enterprises, Inc.*,390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968)." (S.Rep. No. 94-1011, p. 4 (1976), U.S. Code Cong. & Admin.News. (1976) pp. 5908, 5912.) [6]

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[6] The City does not specifically allege special circumstances render the award of fees unjust. However, the City inferentially suggests an award would be unjust because its actions were in good faith and brought about a change in the law. Neither circumstance qualifies as a "special circumstance" prohibiting an award of fees.

These same arguments were presented and rejected in *Wilson v. Stocker* (10th Cir.1987) 819

In these writ proceedings, respondents sought to enforce their rights not to have to defend against unconstitutional charges. It would appear the broad language of section 1988 should encompass proceedings prompted by an impending criminal prosecution as well as actions for declaratory or injunctive relief brought for the same purpose. (Compare *Wilson v. Stocker* (10th Cir.1987) 819 F.2d 943 [arrestee properly awarded attorney's fees against district attorney and attorney general in action for declaratory and injunctive relief to restrain threatened criminal prosecution].)

[8] Instructive on this point is the decision by

F.2d 943. "We there pointed out that '[f]ee awards against enforcement officials are run-of-the-mill occurrences, even though, on occasion, had a state legislature acted or reacted in a different or more timely manner, there would have been no need for a lawsuit or for an injunction.' [Citations] Here, . . . the alleged special circumstances amount to no more than assertions that the Attorney General has acted in good faith, a ground overwhelmingly rejected by the courts. [Citations] Allowing the circumstances offered by the Attorney General here to justify denial of attorney's fees would conflict with controlling case law and defeat the purpose of section 1988, which is not designed to penalize defendants but to encourage injured individuals to seek relief. [Citation.] . . .

"The District Attorney's assertion that fees are unjust because her participation in the litigation helped develop the law and the facts is also unpersuasive. A party to litigation almost always aids in such development. Accepting this assertion as a special circumstance would render a fee award unjust in virtually every case, a result undeniably contrary to the congressional intent that fee awards be 'an integral part of the remedies necessary' to obtain compliance with the civil rights laws. See S.Rep. No. 1011, 1976 U.S.Code Cong. & Admin.News at 4913." (*Wilson v. Stocker, supra*, 819 F.2d at pp. 951-952.)

our Supreme Court in *In re Head* (1986) 42 Cal.3d 223, 228 Cal.Rptr. 184, 821 P.2d 65. The issue in that case was whether prison inmates were properly awarded attorney's fees for a successful challenge to prison conditions brought in habeas corpus proceedings. The attorney fee provision in that case was Code of Civil Procedure section 1021.5, the private attorney general provision, which only provided for an award of attorney's fees if several stringent requirements are met. Although not controlling authority in an action involving an award of fees under the expansive federal civil rights statute, the principles that decision announce guide us to a proper resolution of this issue.

In *In re Head*, supra, 42 Cal.3d 223, 228 Cal.Rptr. 184, 721 P.2d 65, the Department of Corrections challenged the award contending fees were only appropriate in civil proceedings. The Supreme Court disagreed. In rejecting the parties' attempt to characterize the proceedings as either criminal or civil the court concluded: "We shall conclude that the nature of the relief sought, not the label or procedural device by which the action is brought, is determinative of the right to seek fees under section 1021.5. The petitions here presented issues related to the conditions of confinement in a state prison and involved the rights of prison inmates generally. Vindication of these rights is not analogous to a defense against a criminal prosecution. Rather, as respondent conceded, the petitioner's claim is of such a nature that it might have been presented in a purely civil proceeding --- by petition for writ of mandate or action for declaratory relief --- in which case no question would be raised as to the propriety of the award. That petitioners elected to utilize the more expeditious, simplified and less expensive procedure of habeas corpus to vindicate their rights, should not affect the availability of a fee award." (*In re*

Head, supra, 42 Cal.3d at p. 226, 228 Cal.Rptr. 184, 721 P.2d 65.)

The court noted attorney's fees are often awarded in mandate proceedings brought by criminal defendants. (See, e.g., *Olney v. Municipal Court* (1982) 133 Cal.App.3d 455, 184 Cal.Rptr. 78 [to prevent sentencing of misdemeanor defendants in absentia]; *Daniels v. McKinney* (1983) 146 Cal.App.3d 42, 193 Cal.Rptr. 842 [to vindicate right of prison inmates to exercise].) In conclusion, the court stated: "How the party achieves the goal of enforcing the right is not determinative of the right to an award of attorney fees under section 1021.5. The impact of the litigation is." (*In re Head*, supra, 42 Cal.3d at pp. 228-229, 228 Cal.Rptr. 184, 721 P.2d 65.)

In this case respondents could have brought a separate civil action for declaratory or injunctive relief. They instead took the less expensive, more expeditious route of availing themselves of remedies within the original proceeding. Whether this writ proceeding may be characterized as civil or criminal is not significant. Instead it should be recognized for what it is; an original, extraordinary proceeding brought to assert their constitutionally guaranteed civil rights.

In sum, we believe permitting an award of fees for the vindication of constitutional rights in writ proceedings arising from an attempted criminal prosecution is consistent with Congress' intent to authorize such awards to a prevailing party in "any proceeding" which successfully enforces those rights.

DISPOSITION

The award of attorney fees and costs is affirmed. Respondents to recover their costs of appeal.

LILLIE, P.J., and FRED WOODS, J., concur.

APPENDIX # 3

Order of California Supreme Court, August 12, 1993, denying hearing and "depublishing" Lucero II

Second Appellate District, Division Seven, No. B050440
S033385

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

JOSE RONILLO ABOGADO LUCERO Et Al., Respondents

v.

MUNICIPAL COURT OF THE LONG BEACH JUDICIAL DIST., Respondent

THE PEOPLE, Real Party In Interest

Petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed May 7, 1993, which appears at 15 Cal.App.4th 784. (Cal. Const., Art. VI, Section 14, rule 976, Cal. Rules of Court.)

LUCAS
Chief Justice

SUPREME COURT: **FILED**, Aug 12, 1993, Robert Wandruff, Clerk.

APPENDIX # 4

Respondents' original
Petition for Writ of Prohibition
and/or Mandate in Lucero I

Stanley Fleishman
Barry A. Fisher
Robert C. Moest
David Grosz
Fleishman, Fisher & Moest
2049 Century Park East, Suite 3160
Los Angeles, California 90067

Attorneys for Petitioners

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JOSE RONILLO ABOGADO LUCERO, JIMMIE JOHNSON and WALNUT PROPERTIES, Inc., a California Corporation, Petitioners	NO.C632880
vs.	PETITION FOR WRIT OF PROHIBITION AND/OR MANDATE
MUNICIPAL COURT OF THE LONG BEACH JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, Respondent.	
THE PEOPLE OF THE STATE OF CALIFORNIA Real Party in Interest.	

INTRODUCTION

1. Petitioners bring this action to restrain proceedings in, or to compel the dismissal of, three criminal prosecutions under the Long Beach "adult entertainment" zoning ordinance that are proceeding in flagrant violation of controlling law. Pringle v. City of Covina, 111 Cal. App. 3d 153, 171 Cal. Rptr. 251 (1981), held that an ordinance that prohibits a movie theater to be "used for presenting" "adult" films in certain areas of a city can, constitutionally, apply only when the "Use "is a predominant one. It held that it would be unconstitutional for a theater to be barred under such an ordinance for a single showing of an "adult" film.

2. In the face of this holding, the present prosecutions have been brought explicitly under the single-showing standard. Petitioners here demurred to the complaints, but the demurrers were overruled, and the cases may now be set for trial. Moreover, the petitioners are at risk of multiple prosecutions arising out

of each's day's normal operation of a movie theater. It is therefore necessary that relief be granted by this court.

3. This petition is brought pursuant to 42 U.S.C. § 1983 (1982). By the underlying criminal proceedings, petitioners are being subjected to the deprivation, under color of state law, of rights, privileges, and immunities secured by the Constitution of the United States, and particularly the first and fourteenth amendments.

4. Each exhibit hereto is a true and correct copy of what it purports to be and is incorporated in this petition by reference as if fully set forth.

PARTIES

5. Petitioners Jose Ronillo Abogado Lucero, Jimmie Johnson, and Walnut Properties, Inc., are, and at all times mentioned in this petition were, the defendants in three related criminal cases now pending in respondent court, People v. Johnson, Lucero , and Walnut Properties, Inc., Nos M230180, **M120181 [sic**

M230181], M230182. Walnut Properties, Inc. (Walnut), is a California corporation that owns and operates the Lakewood Theater, located at 4501 East Carson Boulevard, City of Long Beach, County of Los Angeles, State of California. At all times mentioned Jimmie Johnson was the president of Walnut and Jose Ronillo Abogado Lucero was an employee of Walnut.

6. Respondent Municipal Court of the Long Beach Judicial District, County of Los Angeles, State of California, is now, and at all times mentioned in this petition was, executing judicial functions in each of the criminal cases mentioned above.

7. Real party in interest People of the State of California is, and at all times mentioned was, the plaintiff in each of the criminal cases mentioned above.

FACTS

8. The petitioners are each charged with twelve counts of violation of section 21.51.030 of the Long Municipal Code. The complaints in the Lucero,

Johnson, and Walnut cases are Exhibits A, B, and C, respectively, hereto. The relevant text of chapter 21.51 is Exhibit D hereto. Each count consists of an allegation that a particular "X-rated movie" was shown at the Lakewood Theater on a particular day, and that the theater is located within 500 feet of a residential zone, 1,000 feet of a public school, and 1,000 feet of a "religious organization."

9. In Pringle v. City of Covina, 115 Cal. App. 3d 151, 171 Cal. Rptr. 251 (1981) (Exhibit E) the court of appeal held that an ordinance, with language substantively identical to that of section 21.51.030 would, on its face, be impermissibly vague. Pringle held that the ordinance must be narrowly construed to meet constitutional requirements and could apply only to theaters presenting a "preponderance" of films which are "adult" films within the meaning of the ordinance.

10. Prior to Pringle, on or about June 20, 1978, Walnut and its then president, Vincent Miranda, were

charged in the respondent court with establishing in a zone permitting "motion picture theaters," an "adult motion picture theater," contrary to the provisions of the Long Beach adult zoning ordinance (Section 9120.41 of the Long Beach Municipal Zoning Ordinance). Johnson was not a party to that action. Walnut and Miranda were found guilty and were placed on summary probation upon the condition that the Lakewood Theater not be operated as an "adult theater." Also prior to Pringle, the Appellate Department of the Superior Court affirmed the conviction. People v. Walnut Properties, Inc., No CRA 16846 (Cal. Super. Ct. App. Dep't July 1, 1980).

11. After Pringle was decided, on or about May 22, 1981, the City Prosecutor of Long Beach charged that Walnut and Miranda had violated the terms of probation by exhibiting certain adult films on May 1, 2, 7 and 8, 1981, at the Lakewood Theater.

12. On September 22, 1983, the probation violation

hearing was heard before the Honorable Kirk Gustafson. During the course of the probation violation hearing, it was stipulated, in substance, that the total adult film exhibition time never exceeded the non-adult film exhibition time at the Lakewood Theater. Following now the constitutionally required definition of "adult theater" set forth in Pringle, Judge Gustafson held that there was no violation of the provisions of probation. The People appealed. The Appellate Department affirmed. People v. Walnut Properties, Inc., No. CRA 21481 (Cal. Super. Ct. App. Dep't Mar. 18, 1985) (Exhibit F). The Appellate Department stated:

> Notwithstanding the holding of the Court of Appeal in Pringle, supra, the city attorney for the City of Long Beach has argued at considerable length, both in the trial court, and in this court, that a single showing of an adult film by respondent constitutes a violation of the provision of the probation of respondent prescribing that the Lakewood Theatre not be operated "as an adult motion picture theater." The city attorney argues that Pringle is "clearly wrong", entitled to no weight, and that it should be declared

> unconstitutional by this court. We note, however, that a petition for hearing by the Supreme Court with respect to Pringle was denied on March 25, 1981.
>
> We further note that Pringle has been approved by three subsequent Court of Appeal decisions.

The City filed a petition for writ of certiorari in the United States Supreme Court, which was denied on October 15, 1985. California v. Walnut Properties, Inc., 106 S. Ct. 230 (1985).

13. On June 13, 1981, shortly after Walnut and Miranda were charged with violating probation, they filed a complaint, Case No. C 369 631, in the Los Angeles Superior Court for injunctive and declaratory relief alleging that the Lakewood Theater was not an adult theater within the meaning of Pringle. The superior court concluded that plaintiffs were entitled to injunctive and declaratory relief, and entered judgment declaring that the city's ordinance "cannot be enforced except in the context of Pringle . . . . Unless a preponderance of

the films exhibited by plaintiffs are adult films as that term is defined in Pringle, the theater is not an adult theater within the meaning of the Long Beach municipal code section."

14. The court of appeal reversed. Walnut Properties, Inc. v. Ussery, 178 Cal. App. 3d Adv. Sh. 186, 223 Cal Rptr. 511 (1986) (Exhibit G). That court concluded that Pringle was wrongly decided, and that a single exhibition of an adult film converted a theater into an adult theater. Walnut (Miranda in the interim having died) filed a petition for review in the California Supreme Court. The court denied review but ordered that the opinion of the court of appeal not be published in the official reports.

15. Pursuant to rule 977(a) of the California Rules of Court, the appellate opinion in Ussery was deprived of precedential value, and, accordingly, the rule enunciated in the published Pringle opinion remains binding

throughout the state.

16. The Long Beach City Prosecutor nevertheless initiated and is pursuing the prosecutions now pending in the respondent court, even though he knew that the activities of the petitioners did not and could not meet the preponderance standard of Pringle. The complaints allege that a single showing of an "X-rated" movie in a particular location violated the Long Beach ordinance.

17. The petitioners filed demurrers to the complaints. The demurrers are substantively identical. Exhibit H is the demurrer of Lucero. The real party in interest opposed the demurrers, Exhibit I, petitioners filed a reply memorandum , Exhibit J, and the real party in interest a "supplemental opposition," Exhibit K.

18. After hearing, the respondent court, on November 18, 1986, overruled the demurrers. The transcript of the hearing is Exhibit L.

BASES OF RELIEF

19. When the demurrers were overruled, respondent court indicated its intention to proceed to trial on the three cases, which action would be in excess of respondent's jurisdiction in that trial of this matter is precluded by the first and fourteenth amendments and article I, section 2, of the California constitution, and by the authoritative rule of law enunciated in Pringle. The above-described action of respondent was also unreasonable, arbitrary, and prejudicial abuse of discretion, and violated a plain duty imposed on respondent by law.

20. The alleged activities on which the criminal cases are based are protected by the first amendment and by article I, section 2, of the California Constitution. On its face and as applied and interpreted by real party in interest and respondent, the Long Beach ordinance violates the right guaranteed by those provisions. The criminal complaints fail to state any public offense, in

particular because they allege that the Long Beach ordinance was violated by a single showing of a film, and do not and cannot allege that the Lakewood Theater shows a preponderance of "adult" films.

ABSENCE OF OTHER REMEDIES

21. Petitioners have no right of appeal from respondent's decision and order of November 18, 1986, nor a plain, speedy and adequate remedy at law other than the relief sought in this petition.

IRREPARABLE INJURY

22. As a result of the action described above, unless the further proceedings in the actions in respondent court are not restrained and prohibited or unless respondent is compelled to perform its legal duty and sustain the demurrers filed by petitioners, petitioners will be irreparably injured in that the exercise of their right of freedom of speech will be chilled and denied, and they are threatened with a multiplicity of prosecutions

arising from the normal and lawful operation of a motion picture theater.

WHEREFORE, petitioners pray that:

1. An alternative writ of prohibition and/or mandate issue under the seal of this court commanding respondent court to desist and refrain from taking any further action or proceedings, including trial, in the criminal actions above described until further order of this court, and directing respondent and real party in interest to show cause before this court, at a time and place then or thereafter specified by court order, why respondent should not be absolutely and forever restrained from any further proceedings in the actions; and to sustain the demurrers filed by petitioners or to show cause before this court, why it has not done so and why a peremptory writ should not issue; and

2. On return of the alternative writ and hearing on the order to show cause, a peremptory writ of prohibition

issue under the seal of this court restraining respondent absolutely and forever from taking any further proceedings in the actions and compelling respondent to sustain the demurrers filed by petitioners; and

3. Petitioners recover their attorney's fees; and

4. Petitioners recover the costs of this action; and

5. The court grant such other and further relief as may be just and proper.

Dated: January 20, 1987

Respectfully submitted,

Fleishman, Fisher & Moest

Stanley Fleishman
Barry A. Fisher
Robert C. Moest
David Grosz

By:_____
David Grosz

Attorneys for petitioners

APPENDIX # 5

Judgment for Peremptory
Writ of Mandate

Stanley Fleishman
Barry A. Fisher
Robert C. Moest
David Grosz
Fleishman, Fisher & Moest
2049 Century Park East, Suite 3160
Los Angeles, California 90067

Attorneys for Petitioners

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JOSE RONILLO ABOGADO LUCERO, JIMMIE JOHNSON and WALNUT PROPERTIES, Inc., a California Corporation, Petitioners vs. MUNICIPAL COURT OF THE LONG BEACH JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, Respondent.	NO.C632880 JUDGMENT FOR ISSUANCE OF PEREMPTORY WRIT OF MANDATE
THE PEOPLE OF THE STATE OF CALIFORNIA Real Party in Interest.	

The matter came on regularly for hearing

before this court on May 14, 1987, in the courtroom of the Honorable Jack M. Newman, Judge, pursuant to the verified petition of Jose Ronillo Abogado Lucero, Jimmie Johnson, and Walnut Properties, Inc.

David Grosz, of Fleishman, Fisher & Moest, appeared as attorney for petitioners, and Gerry L. Ensley, Deputy City Prosecutor, City of Long Beach, Appeared as attorney for real party in interest.

Real party in interest having filed an answer to the petition, each side having submitted memoranda of points and authorities in support of their respective contentions, exhibits having been received in evidence and examined by the court, arguments having been presented and the cause submitted for decision, the court having determined that, pursuant to controlling authority, the proceedings against petitions under the allegations of the complaints filed in the respondent court subject the petitioners to a deprivation of rights

secured by the first and fourteenth amendments to the United States Constitution and article I, section 2, of the California Constitution, and the court having directed that judgment and a peremptory writ of mandate should issue in the cause,

NOW, THEREFORE, IT IS ADJUDGED, ORDERED, AND DECREED that: respondent immediately upon receipt thereof to grant the demurrers filed by the petitioners herein in the actions now pending before it entitled The People of the State of California v. Walnut Properties, Inc., Jimmie Johnson, and Jose Ronillo Abogado Lucero, Nos. M 230180, M 230181, and M 230182, with 30 days leave for the real party in interest to file amended complaints in said actions.

Dated: August 5, 1987

_____

Judge of the Superior Court

Judgment entered on _____,

1987, Vol. _____ of the Judgment Book, page

_____.

_____

Clerk

By _____

Deputy Clerk

APPENDIX # 6

Respondents' Request for
Attorney's Fees pursuant to
42 U.S.C. § 1988, commencing
Lucero II

Stanley Fleishman
Barry A. Fisher
Robert C. Moest
David Grosz
Fleishman, Fisher & Moest
2049 Century Park East, Suite 3160
Los Angeles, California 90067

Attorneys for Petitioners

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JOSE RONILLO ABOGADO LUCERO, JIMMIE JOHNSON and WALNUT PROPERTIES, Inc., a California Corporation,	NO. C632880
Petitioners	MOTION OF PETITIONERS FOR ORDER AWARDING ATTORNEY'S FEES (42 U.S.C. § 1988)
vs.	
MUNICIPAL COURT OF THE LONG BEACH JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA,	
Defendants.	
THE PEOPLE OF THE STATE OF CALIFORNIA	
Real Party in Interest.	

Petitioners move for an order awarding them attorney's fees, against the people of the state of California (City of Long Beach), real party in interest, pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982).

The motion is based of the ground that petitioners are the prevailing party in this proceeding brought pursuant to 42 U.S.C. § 1983 (1982) and that no special circumstances exist that would render an award of fees unjust.

The motion is based on this motion, all papers and records on file herein, the declarations of Stanley Fleishman, David Grosz, and Stuart L. Kadison, the memorandum of points and authorities served and filed herewith, and on such other and further matters as may be presented at or before the hearing of the motion. Petitioner specifically reserves the right to supplement this motion with respect to further time

and costs expended.

The declarations and papers in support of this motion establish the following fees of Stanley Fleishman $29,547 and of David Grosz $16,410, so that petitioner is entitled to fees in the lodestar amount of $45,957; and out-of-pocket expenses of $1,773.85. The total amount sought on this motion is, therefore $47,730.85.

Dated: October 23, 1989

Respectfully submitted,

Fleishman, Fisher, & Moest

Stanley Fleishman
Barry A. Fisher
Robert C. Moest
David Grosz

By: _____
David Grosz
Attorneys for Petitioner

Stanley Fleishman
Barry A. Fisher
Robert C. Moest
David Grosz
Fleishman, Fisher & Moest
2049 Century Park East, Suite 3160
Los Angeles, California 90067
(213) 557-1077

Attorneys for Petitioners

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JOSE RONILLO ABOGADO LUCERO, JIMMIE JOHNSON and WALNUT PROPERTIES, Inc., a California Corporation, Petitioners vs. MUNICIPAL COURT OF THE LONG BEACH JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, Defendants. THE PEOPLE OF THE STATE OF CALIFORNIA Real Party in Interest.	NO. C632880 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ATTORNEY'S FEES (42 U.S.C. § 1988)

I.

INTRODUCTION.

On January 20, 1987, the petitioners Jose Ronillo Abogado Lucero, Jimmie Johnson, and Walnut Properties, Inc., filed, pursuant to 42 U.S.C. § 1983 (1982), a petition for writ of mandate restraining criminal actions brought against them by the Long Beach City Prosecutor. Long Beach had asserted against each petitioner twelve counts of violation of Long Beach, Cal., Municipal Code § 21.51.020, the city's "adult entertainment " zoning ordinance. Petitioners asserted that the ordinance, as construed in the criminal complaints, was unconstitutionally broad inasmuch as the complaints alleged that the exhibition of a single adult film made the theater an "adult theater" within the meaning of ordinance.

This court granted the writ. It determined that, pursuant to controlling authority, the proceedings

against petitioner under the allegations of the complaint filed in the respondent court subject the petitioners to a deprivation of rights secured by the first and fourteenth amendments to the United States constitution and article I, section 2 of the California Constitution.

Judgment for Issuance of Peremptory Writ of Mandate at 2 (Aug. 5, 1987).

The city then sought review by way of a writ of mandate from the court of appeal to compel this court to vacate its judgment.[7]/ The court of appeal denied the petition on September 9, 1987. On November 18, 1987, the supreme court granted the city's petition for review, and transferred the case back to the court of appeal to issue an alternative writ. After argument,

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[7]/ The superior court's grant or denial of a writ to a municipal court is not appealable, but is subject to discretionary review by the appellate court on a petition for a writ. Cal. Civ. Proc. Code § 904.1(a) (West Supp. 1989).

the court filed its opinion, denying the city's petition. People v. Superior Court (Lucero), 198 Cal. App. 3d 1038, 244 Cal. Rptr. 502 (1988).

The supreme court again granted review and heard the case on the merits, with full briefing and argument. It, too, held the city's "single-use" theory unconstitutional, and it affirmed the judgement of the court of appeal. People v. Superior Court (Lucero), 49 Cal. 3d 14, 774 P.2d 769, 259 Cal. Rptr. 740 (1989).

The judgment of this court is now final. Petitioners accordingly move for attorney's fees against the City of Long Beach for the case pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982).

II.

PETITIONERS, AS PREVAILING PARTIES IN THIS 42 U.S.C. § 1983 PROCEEDING, ARE ENTITLED TO A FEE AWARD UNDER THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT, 42 U.S.C. § 1988.

The Civil Rights Attorney's Fees Awards Act of 1976 provides in pertinent part that "[i]n any action or proceeding to enforce . . . section[] . . . 1983 . . . of the title . . ., the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1982). The statute applies in state courts equally as in federal courts. E.g., Filipino Accountants' Ass'n v. State Bd. of Accountancy, 155 Cal. App. 3d 1023, 1031, 204 Cal. Rptr. 913, 917 (1984).

The legal principles that shape the structure of section 1988 are well established, and have been thoroughly considered in California cases.

While section 1988 gives a trial court discretion in

deciding whether to award attorney fees to a prevailing party, that discretion is narrowly limited. (Bonnes v. Long (4th Cir. 1979) 599 F.2d 1316, 1318.) The controlling standard is that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." (Newman v. Piggie Park Enterprises (1968) 390 U.S. 400, 402 [19 L. Ed. 2d 1263, 1266, 88 S. Ct 964].) Section 1988 requires a strong showing of special circumstances to justify denying an award of attorney fees to the prevailing party in a section 1983 claim. (Riddle v. National Democratic Party (5th Cir. 1980) 624 F.2d 539, 543.) McMahon v. Lopez, 199 Cal. App. 3d 829, 836, 245 Cal. Rptr. 172, 177 (1988). All the statutory requisites are met here.

First, this proceeding was brought to enforce 42

U.S.C. § 1983 (1982), [1]/ and therefore is a proper case for a section 1988 award. The petition specifically alleged that it was "brought pursuant to 42 U.S.C. § 1983 (1982)," since, "[b]y the underlying criminal proceedings, petitioners are being subjected to the deprivation, under color of state law, of rights, privileges, and immunities secured by the Constitution of the United States, and particularly the first and fourteenth amendments." Petition for Writ of Prohibition and/or Mandate at 2, para. 3. As noted above, the writ granted by this court specified that the

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[1]/ Section 1983 provides, in pertinent part, as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

42 U.S.C. § 1983 (1982), quoted in McMahon v. Lopez, 199 Cal. App. 3d at 835 n.2, 245 Cal. Rptr. at 175 n.2.

petitioners were being denied their first and fourteenth amendment rights, a conclusion upheld by the court of appeal and the supreme court.

Second, petitioners are clearly the prevailing parties in this proceeding within the meaning of section 1988. "'[P]laintiffs may be considered "prevailing parties" for attorney' fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" Sokolow v. County of San Mateo, 213 Cal. App. 3d 231, 242, 261 Cal. Rptr. 520, 529 (1989) (emphasis in the original) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1939 (1983)). Here, petitioners entirely succeeded in achieving the benefit they sought. The supreme court ultimately held that each alleged violation in the criminal actions was "based on the unconstitutional 'single use' standard," and that the city was "not entitled to proceed with the

action as pleaded." People v. Superior Court (Lucero), 49 Cal. 3d at 28, 774 P. 2d at 777, 259 Cal. Rptr. at 748.

Finally, there are no "special circumstances" here that would render a fee award unjust, much less the "strong showing" necessary to deny an award to a prevailing plaintiff. Courts have rejected in carload lots proffered claims of "special circumstances" in highly analogous cases. See, e.g., EWAP, Inc. v. City of Ontario, 177 Cal. App. 3d 1108, 1115-18, 223 Cal. Rptr. 422, 427-30 (1986) (fee award under section 1988 to "adult" bookstore that succeeded in its challenge to an "adult uses" zoning ordinance); see also, e.g., Sokolow v. County of San Mateo, 213 Cal. App. 3d at 245, 261 Cal. Rptr. at 528 (no special circumstances where plaintiffs "were successful in vindicating and enforcing" a "vital constitutional right," there, of equal protection).

III.

"LODESTAR" FEES SHOULD BE AWARDED FOR ALL TIME EXPENDED BY PETITIONERS' ATTORNEYS, CALCULATED AT THE ATTORNEYS' REASONABLE HOURLY RATES.

"The criteria for the calculation of attorney's fees are the same under both" section 1988 and the state public interest fee awards act, Cal. Civ. Proc. Code § 1021.5 (West 1987). Green v. Obledo, 161 Cal. App 3d 678, 683, 207 Cal. Rptr. 830, 832 (1984). "[S]tatutorily authorized fees are computed on the basis of the reasonable market value of the services rendered . . . ." Serrano v. Unruh (Serrano IV)., 32 Cal. 3d 621, 643, 652, P.2d 985, 999, 186 Cal. Rptr. 754, 768 (1982).

The "fundamental"' principle in calculating the amount of the award is to "determine a 'touchstone' or 'lodestar' figure based on a 'careful compilation of the time spent and reasonable hourly compensation for each attorney . . . involved in the presentation of the

case.'" Press v. Lucky Stores Inc., 34 Cal. 3d 311, 322, 667 P.2d 704, 710, 193 Cal. Rptr. 900, 906 (1983). (quoting Serrano v. Unruh (Serrano III), 20 Cal. 3d 25, 48, 569 P.2d 1303, 1316, 141 Cal. Rptr. 315, 328 (1977)).[2]/

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[2]/ The court may increase the "lodestar" or "touchstone" amount "depending on other factors involved in the lawsuit." Maria P. v. Riles, 43 Cal. 3d 1281, 1294. 743 P.2d 932, 940, 240 Cal. Rptr. 872, 880 (1987). The facts the trial court may consider in adjusting the lodestar figure include

> "(1) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award; (4) the fact that an award against the state would ultimately fall upon the taxpayers; (5) the facts that the attorneys in question received public and charitable funding for the purpose of bringing law suits of the character here involved; (6) the fact that the monies awarded inure not to the individual benefit of which the attorneys involved but the organizations by which they are employed . . . ."

20 Cal. 3d at 49, 569 P.2d at 1316, 141 Cal. Rptr. at 328; accord, Serrano III, Maria P., 43 Cal. 3d at 1294 n.8, 743 P.2d at 940 n.8, 240 Cal. Rptr. at 880 n.8. Petitioners here, however, request only

Thus, "absent special circumstances rendering the award unjust, fees recoverable under section 1021.5 ordinarily include compensation for all hours reasonably spent, including those necessary to establish and defend the fee claim." Serrano IV, 32 Cal. 3d at 639, 652 P.2d at 997, 186 Cal. Rptr. at 766 (footnote omitted). These hours should be assessed at "prevailing hourly rates as the basis for the reasonable market value of lawyers' services." Id. at 640, 652 P. 2d at 997, 186 Cal. Rptr. at 766.

In this case, the petitioners have submitted evidence supporting the hours worked and rates claimed: Stanley Fleishman, 84.42 hours at $350 per hour = $29,567 and David Grosz, 82.05 hours at $200 per hour = $16,410. The total lodestar fees are therefore $45,957. This amount is clearly justified.

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the lodestar amount.

The number of hours invested in the proceeding was reasonable. The case presented important legal issues, and a need for an expeditious hearing to preserve the rights of stake. By the time it was over, it involved hearings and briefs at three levels of the judicial system. The concentration of effort by petitioner's counsel was vindicated by the outcome of the case. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will cover all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified." Hensley v. Eckerhart, 461 U.S. 424, 435, 103 S. Ct. 1933, 1940 (1983).

The hourly billing rates of petitioners' counsel are also reasonable. These rates are entirely commensurate with the particularized experience and expertise of counsel as described in their declarations

and in that of Stuart L. Kadison, a former president of the Los Angeles County Bar Association and Governor of the California State Bar.

The requested rates of $350 per hour for Mr. Fleishman and $200 per hour for Mr. Grosz, attorneys with considerable experience in public law litigation, are entirely reasonable.

As noted above, under Serrano IV, the time spent in securing the fee award itself is fully includible in the calculation on the same basis as time spent of the merits. Hence petitioners reserve the right to seek additional compensation for any additional time spent in meeting opposition to this motion.

Finally, plaintiffs, are also entitled to recover "all incidental and necessary expenses incurred in furnishing effective and competent representation." 122 Cong. Rec. H. 12,160 (daily ed. Oct. 1, 1976) (remarks of Rep. Drinan). There is "unanimous

federal circuit court authority that the attorneys' reasonable and necessary costs and expenses may be awarded to a prevailing party pursuant to 42 U.S.C. § 1988." Palmigiano v. Garrahy, 707 F.2d 636, 637 (1st Cir. 1983) (per curiam) (collecting cases). [A]wards of such costs--costs that are ordinarily billed to a client--" including, for example, "telephone calls, postage, air courier and attorney travel expenses," are "routine under . . . fee statutes." International Woodworkers Local 3-98 v. Donovan, 769 F.2d 1388, 1392 (9th Cir. 1985).

IV.

CONCLUSION.

Attorney's fees should be awarded to petitioners pursuant to 42 U.S.C. § 1983 (1982) for all time expended by petitioners' attorneys at their reasonable hourly rates and for their out-of-pocket expenses.

Dated: October 23, 1989

Respectfully submitted,

Fleishman, Fisher & Moest
Stanley Fleishman
Barry A. Fisher
Robert C. Moest
David Grosz

By: _____
David Grosz

Attorneys for petitioners

Stanley Fleishman
Barry A. Fisher
Robert C. Moest
David Grosz
Fleishman, Fisher & Moest
2049 Century Park East, Suite 3160
Los Angeles, California 90067
(213) 557-1077

Attorneys for Petitioners

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JOSE RONILLO ABOGADO LUCERO, JIMMIE JOHNSON and WALNUT PROPERTIES, Inc., a California Corporation, Petitioners vs. MUNICIPAL COURT OF THE LONG BEACH JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, Defendants.	NO. C632880 DECLARATION OF STANLEY FLEISHMAN IN SUPPORT OF MOTION FOR ATTORNEY'S FEES (42 U.S.C. § 1988)
THE PEOPLE OF THE STATE OF CALIFORNIA Real Party in Interest.	

Stanley Fleishman, declares as follows:

1. I am an attorney for petitioners herein and make this declaration in support of petitioner's motion for attorney's fees pursuant to 42 U.S.C. § 1988. I have personal knowledge of the facts stated herein and could and would testify competently thereto if called upon to do so.

2. I am an attorney at law and am a member of the bars of the state of California and New York and of the United States Supreme Court.

3. I am a senior partner in the firm of Fleishman, Fisher & Moest. I have been the lead attorney in this matter and have retained the final authority for the conduct of the case, although David Grosz, a colleague in my firm, was assigned to handle many tasks in the case. For most of my practice, I have specialized in civil rights litigation, with an emphasis on First Amendment rights and rights of disabled

people. While still in New York, I filed an amicus curiae brief in James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944), a leading California Supreme Court civil rights case.

4. I orally argued the following cased in the United States Supreme Court: Alberts v. California [Roth v. United States], 345 U.S. 476, 77 S.Ct. 1304 (1957); Austin v. Kentucky; [Redrup v. New York], 386 U.S. 757, 87 S.Ct. 1414 (1967); Blount v. Rizzi, 400 U.S. 410, 91 S.Ct. 423 (1971); Quantity of Copies of Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723 (1964); Smith v. California, 361 U.S. 147, 80 S.Ct. 215 (1959); United States v. Thirty-Seven Photographs, 402 U.S. 363, 91 S.Ct. 1400 (1971); Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887 (1974); Hicks v. Miranda, 422 U.S. 332, 95 S.Ct. 2281 (1975); Kaplan v. California, 413 U.S. 115, 93 S.Ct. 2680 (1973); See also, e.g., Carlisle v. Landon, 73 S.Ct. 1179 (Douglas,

Circuit Justice, 1953); Stanard v. Olesen, 74 S.Ct. 768 (Douglas, Circuit Justice, 1958).

5. Additionally, I prevailed in the United States Supreme Court after filing a petition for writ of certiorari, but before argument, in the following cases: Aday v. United States, 338 U.S. 447, 87 S.Ct. 2095 (1967); Books, Inc. v. United States, 388 U.S. 449, 87 S.Ct. 2098 (1967); Corinth Publications, Inc v. Wesberry, 388 U.S. 448, 87 S.Ct. 2096 (1967); Felton v. Pensacola, 390 U.S. 340, 88 S.Ct. 1098 (1968); Quantity of Copies Books v. Kansas, 388 U.S. 452, 87 S.Ct. 2104 (1967); Rabeck v. New York, 391 U.S. 462, 88 S.Ct. 1716 (1968); Smith v. California, 375 U.S. 259, 84 S.Ct. 361 (1963).

6. I orally argued the following cases in the California Supreme Court: Aday v. Superior Court, 55 Cal.2d 789, 13 Cal Rptr. 415 (1961); Burton v. Municipal Court, 68 Cal.2d 856, 16 Cal.Rptr. 889 (1961); Burton

v. Municipal Court, 68 Cal.2d 684, 68 Cal.Rptr. 721 (1968); Flack v. Municipal Court, 66 Cal.2d 981, 59 Cal.Rptr. 872 (1967); Barrows v. Municipal Court, 1 Cal.3d 821, 83 Cal.Rptr. 833 (1971); People v. Rossi, 81 Cal.3d 295, 134 Cal.Rptr. 64 (1976).

7. I argued the case of State v. Jackson, 224 Ore. 337, before the Oregon Supreme Court. I argued the case of Quantity of Copies of Books v. State, 191 Kan. 13, 379 P.2d 254, before the Kansas Supreme Court.

8. I argued the following cases, inter alia, in various United States Courts of Appeals: Toberoff v. Summerfield, 245 F.2d 360 (9th Cir. 1957); 256 F.2d (9th Cir. 1958); Oreson v. Standard, 227 F.2d 785 (9th Cir. 1955); Haldeman v. United States, 340 F.2d 59 (10th Cir. 1965); Grant v. United States, 380 F.2d 748 (9th Cir. 1967); Corsican Productions v. Pitchess, 388 F.2d 441 (9th Cir. 1964); Steiner v. Hocke, 272

F.2d 384 (9th Cir. 1959); Luros v. United States, 490 F.2d 76 (5th Cir. 1974); United States v. Outpost Dev. Co., 552 F.2d 566 (9th Cir. 1977).

9. I appeared as attorney of record in the following cases, inter alia, in the United States District Courts: Cinema Classics Ltd. v. Busch, 339 F.Supp. 43 (C.D. Cal.) (three-judge court), aff'd mem. sub nom. Davis v. Cinema Classic, Ltd., 409 U.S. 807, 93 S.Ct. 105 (1972): LeBaron v. Olesen, 125 F.Supp. 53 (S.D. Cal. 1954); United States v. Linetsky, Crim. No 39798 (E.D. Mich.); In re Lousiana News Co., 187 F.Supp. 241 (E.D. La. 1960); Barrows v. Reddin, 301 F.Supp. 575 (C.D. Cal. 1971); United States v. Bloom, No. 7144-WJF (C.D. Cal. 1971); Door v. Pitchess, No. 63-15-PH (C.D. Cal. 1963); Elysium, Inc. v. Olesen, No. 63-385-PH (C.D. Cal. 1963); United States v. Frew, 187 F.Supp. 500 (E.D. Mich. 1960); United States v. Frew/Laning, Crim. No. 39414 (E.D. Mich. 1963);

Alegret v. Arnebergh, Civ. No. 70-170-ALS (C.D. Cal. 1970); United States v. Arno, No. CR 70-224 (D. Ariz. 1971); Rizzi v. Blount, 305 F.Supp. 634 (C.D. Cal. 1969).

10. The cases mentioned in paragraphs 4 and 9 above, are all in the First Amendment field. I also have extensive experience in litigating matters involving the rights of disabled people. I am an adjunct professor of law at Southwestern University School of Law where I teach a course on Constitutional Litigation--The Rights of Disabled People. In connection with that course I co-authored an unpublished book entitled Manual for Litigation: Rights of Disabled People. I have actively litigated a large number of cases involving Section 504 of the Rehabilitation Act. See, e.g., Kling v. County of Los Angeles, 633 F.2d 876 (9th Cir. 1980) (Kling I); Kling v. County of Los Angeles, 769 F.2d 532 (9th Cir.

1985) (Kling II), rev'd, No. 85-295 (U.S. Nov. 4, 1985); Pomerantz v. County of Los Angeles, 674 F.2d 1288 (9th Cir. 1982); Rose v. United States Postal Serv. 725 F.2d Adv. Sh. 1250 (9th Cir. 1984); Williams v. United States, 704 F.2d 1162 (9th Cir. 1983); California Ass'n of the Physically Handicapped, Inc. v. FCC, 742 F.2d 667 (9th Cir. 1983); California Paralyzed Veterans Ass'n v. FCC, 496 F.Supp. 125 (C.D. Cal. 1980); California Ass'n of the Physically Handicapped, Inv. v. FCC, 778 F.2d 823 (D.C. Cir. 1985); Westside Community for Independent Living v. Obledo, 33 Cal.3d 348, 188 Cal.Rptr. 873.

11. I have kept detailed contemporaneous time records in this case, true copies of which are attached to this declaration as Exhibit A and incorporated herein by this reference. The time reflected on these records was reasonable and necessary to be expended in order to represent petitioners in this

matter. Among other things, I argued this case in the Court of Appeal, and briefed and argued it in the Supreme Court. As set out in the attached time sheets, my total expenditure of attorney time in this action, through the date of this declaration, is 84.42 hours. A reasonable rate for my services is $350 per hour. Accordingly, a reasonable attorney's fee award in this action for my services would be $29,547.00.

12. Fleishman, Fisher & Moest has reasonably expended $1,773.85 in out-of-pocket expenses in this matter, as set out in the schedule of expenses, attached hereto as Exhibit B and incorporated herein by this reference.

13. As set forth above, the firm presently constituted as Fleishman, Fisher, & Moest emphasizes public interest law and particularly specializes in First Amendment and civil rights issues. The areas of law which comprise the firm's practice are diverse and

include land use and environmental law, immigration, tax, and freedoms of press, speech and religion. The firm has litigated in nearly every federal circuit, has appeared before the United States Supreme Court on several occasions, and has served as chief counsel on numerous reported decisions.

14. Accordingly, this court should award reasonable attorney's fees for my services in the instant case commensurate with the fees customarily charged for major civil litigation services. In my opinion that amount would be $29,547.00, plus expenses of $1,773.85.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 23rd day of October, 1989, at Los Angeles, California.

Stanley Fleishman

020587 044.01F SF .25
Conf. w/DG, RCM re: order for new brief.
070887 044.01F SF .17
Conf. w/SF re possibility of attorney fees.
081187 044.01F SF .17
Conf. w/DG re strategy.
090987 044.01F SF .58
Strategy conference w/BAF on options regarding writ petition filed by prosecutor.
020988 044.01F SF 4.25
Conf. w/DG re argument; prep. for argument.
021088 044.01F SF 4.00
Ct. of app. argument.
021888 044.01F SF .33
Conf. w/BAF, DG re request for publication.
033188 044.01F SF .17
Conf. w/DG.
062888 044.01F SF 3.00
Review of record and file.
062988 044.01F SF 3.00
Complete review of record and file.
063088 044.01F SF 7.00
Research - petitioner's cases.
070188 044.01F SF 7.00
Research, federal and state law re: adult zoning.
070588 044.01F SF 5.00
Research prior restraints and single showing.
070688 044.01F SF 4.00
Research equal protection and due process.
070788 044.01F SF 3.00
Draft outline of brief.
070888 044.01F SF 5.00
Draft brief.
071188 044.01F SF 6.00

Review and edit of brief.
071488 044.01F SF 6.00
Final revision and edit.
071988 044.01F SF 1.00
Final check of brief.
040389 044.01 SF
5.50 Research.
040589 044.01 SF
2.00 Research.
040789 044.01 SF
6.00 Research and preparation for argument.
041089 044.01 SF
6.00 Research and preparation.
041189 044.01 SF
5.00 Preparation and argument.

Stanley Fleishman
Barry A. Fisher
Robert C. Moest
David Grosz
Fleishman, Fisher & Moest
2049 Century Park East, Suite 3160
Los Angeles, California 90067
(213) 557-1077

Attorneys for Petitioners

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JOSE RONILLO ABOGADO LUCERO, JIMMIE JOHNSON and WALNUT PROPERTIES, Inc., a California Corporation, Petitioners vs. MUNICIPAL COURT OF THE LONG BEACH JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, Defendants.	NO. C632880 DECLARATION OF DAVID GROSZ IN SUPPORT OF MOTION FOR ATTORNEY'S FEES (42 U.S.C. § 1988)
THE PEOPLE OF THE STATE OF CALIFORNIA Real Party in Interest.	

David Grosz declares as follows:

1. I am an attorney admitted to practice before this court. I am a member of the firm of Fleishman, Fisher, & Moest and am one of the attorneys for the Petitioners in this matter. I researched and drafted the writ papers filed in the Superior Court, argued the writ in the Superior Court, prepared the papers supporting the present motion, and performed numerous other tasks in connection with the litigation.

2. I have kept detailed contemporaneous time records in this case, true copies of which are attached to this declaration as Exhibit A and incorporated herein by this reference. The time reflected of these records was reasonable and necessary to be expended in order to represent the petitioners in this matter. As set out in the attached time sheets, my total expenditure of attorney time, properly billable, in this case, through the date of his declaration is 82.05

hours. My reasonable and normal attorney's billing rate is $200.00 per hour. Accordingly, a reasonable attorney's fee award in this action for my services would be $16,410.00.

3. I graduated in 1970 from the Massachusetts Institute of Technology in Cambridge, Massachusetts, with Bachelor of Science degrees in economics and philosophy. I received my legal education at the University of California, Los Angeles, from which I graduated in 1975 with a J.D. degree.

4. I was admitted to practice before the courts of the States of California and New York in 1976. I am also admitted to practice before the United States Supreme Court, the United States Courts of Appeals for the Third, Fifth, Eight, Ninth, Eleventh, and District of Columbia Circuits and the United States District Court for the Central District of California.

5. My studies and activities in law school and my

practice since that time have been concentrated in the areas of civil rights law and litigation. While a law student, I participated in a full-time externship with NAACP Legal Defense and Educational Fund, Inc., in San Francisco, California, where I worked with William Bennett Turner and other attorneys on litigation involving employment and housing discrimination, prisoner's rights and related fields.

6. After admission to the bar, I engaged in the private practice of law an emphasis on employment discrimination and other federal civil rights litigation. E.g., Clayton v. McDonnell-Douglas Corp., 584 F.2d 980 (9th Cir. 1978), vacating mem. 419 F.Supp. 18 (C.D. Cal. 1976). In early 1978, I joined the Law Offices of Arthur S. Ecker, in Beverly Hills, California, where I practiced civil litigation. Durilg this time, I was also co-counsel for a intervening party in the Los Angeles, California, school desegregation litigation

that culminated with Crawford v. Board of Education, 458 U.S. 527 (1982).

7. In September, 1978, I became associated with the firm now constituted as Fleishman, Fisher & Moest of Los Angeles, California which specializes in civil rights and other areas of non-commercial litigation. I have practiced with the firm since that time, except that, for the academic year 1988-89, I accepted an appointment and served as Bigelow Teaching Fellow and Lecturer in Law at the University of Chicago Law School. I have participated during my association with Fleishman, Fisher, & Moest in the litigation of numerous public law cases in many jurisdictions, including the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and District of Columbia Circuits, numerous federal district courts in all parts of the country, and California state courts. E.g., Board of Airport Commissioners v. Jews for Jesus, Inc., 482

U.S. 569 (1987); Larson v. Valente, 456 U.S. 228 (1982); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981); Morongo Band of Mission Indians v. California State Board of Equalization, 858 F.2d 1376 (9th Cir. 1988); Carreras v. City of Anaheim, 768 F.2d 1039 (9th Cir. 1985); Inification Church v. INS, 762 F.2d 1077 (D.C. Cir. 1985); International Soc'y for Krishna Consciousness v. Air Canada, 727 F.2d 253 (2d Cir. 1984); Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981), cert. dismissed, 458 U.S. 1124 (1982); Edwards v. Maryland State Fair & Agric. Soc'y, 628 F.2d 282 (4th Cir. 1980); Walker v. Wegner, 624 F.2d 60 (8th Cir. 1980);International Oceanic Enterprises v. Menton, 614 F.2d 502 (5th Cir. 1980); International Soc'y for Krishna Consciousness v. Collins, 609 F.2d 151 (5th Cir. 1980); Holy Spirit Ass'n for the Unification of World Christianity v. Alley, 604 F.2d 669 (5th Cir.

1979); International Soc'y for Krishna Consciousness v. Bowen, 600 F.2d 667 (7th Cir.), cert. denied, 444 U.S. 963 (1979); International Soc'y for Krishna Consciousness v. Lee, 105 F.R.D. 435 (S.D.N.Y. 1984); Greater Los Angeles Council on Deafness v. Zolin, 607 F.Supp. 175 (C.D. Cal. 1984), aff'd in part, rev'd in part, 812 F.2d 1103 (9th Cir. 1987); Westfall v. Board of Commr's., 477 F. Supp. 862 (N.D. Ga. 1979)' Spiritual Psychic Science Church of Truth v. City of Azusa, 39 Cal. 3d 501, 703 P.2d 1119, 217 Cal. Rptr. 225 (1985); Tiernan v. Trustees of the Cal. State Univ. & Colleges, 33 Cal. 3d 211, 655 p.2d 317, 188 Cal. Rptr. 115 (1982); Friends of Westwood v. City of Los Angeles, 191 Cal. App 3d 259, 235 Cal. Rptr. 788 (1987); El Patio v. Permanent Rent Control Bd., 110 Cal. App. 3d 915, 168 Cal. Rptr. 276 (1980); Perlman v. Municipal Court (People), 88 Cal. App. 3d 568, 160 Cal. Rptr. 567 (1979). I have participated in

amicus curiae briefs in Riley v. National Fed'n of the Blind, 108 S.Ct. 2267 (1988); Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984); Village of Schaumburg v. Citizens for a Better Environment, 44 U.S. 620 (1980); Chess v. Widmar, 635 F.2d 1310 (8tj Cir. 1980), aff'd sub. nom. Widmar v. Vincent, 454 U.S. 263 (1981).

8. Accordingly, this court should award reasonable attorney's fees for my services in the instant case commensurate with the fees customarily charged for major litigation services.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 23rd day of October, 1989, at Los Angeles, California.

_____

David Grosz

010787 351.08 G
.50 Conf. w/SF re writ.
010987 351.08 G
.33 Conf. w/SF re strategy.
011487 351.08 G
.25 Conf. w/RCM re procedure.
011587 351.08 G
1.33 Preliminary research re writ petition.
011587 351.08 G
1.33 Research re writ.
011687 351.08 G
3.25 Research res judicata, Pringle case law.
011687 351.08 G
3.25 Research & drafting of writ petition.
011887 351.08 G
6.17 Research and drafting re writ petition.
011987 351.08 G
5.83 Draft and revise petition & memorandum.
012887 351.08 G
2.75 Review writ opposition; draft reply.
012987 351.08 G
.83 Revise reply brief; conf. w/SF.
020587 044.01F G 3.08
Draft brief ordered by court.
020687 044.01F G 4.25
Draft brief per court order.
021187 044.01F G 2.25
Revise brief re court order; review opp. brief.
021287 044.01F G 1.25
Review opposition brief.
051387 044.01F G 2.08
Preparation for hearing on writ.
051487 044.01F G 3.50

Travel; hearing on writ - Dept. 70; conf. w/SF.
051787 044.01F G 1.17
Prepare judgment, writ.
051887 044.01F G .42
Conf. w/SF; revise papers to be submitted after decision.
070887 044.01F G .42
Conf. w/RCM re new writ req. by judge.
071087 044.01F G 1.05
Draft new judgment and writ requested by judge.
081187 044.01F G .33
Review judgment; conf. w/SF re strategy.
081387 044.01F G .33
Service of writ; letter to G. Ensley.
090787 044.01F G 2.67
Research re propriety of writ, procedure for answer, preliminary review of writ.
090987 044.01F G .42
Letter to J. Johnson.
091187 044.01F G .25
Conf. w/BAF re denial of writ.
092287 044.01F G .67
Review petition for review.
092387 044.01F G .58
Call w/R. Garrou re recent cases; letter to J. Johnson.
121887 044.01F G .33
Revise motion for extension of time.
122987 044.01F G 2.83
Research re court response.
123087 044.01F G 2.67
Research re collateral estoppel, drafting of response to writ.
123187 044.01F G 2.42
Response to writ.
120187 044.05F G .50
Review alt. writ; calls w/Cal.App. & Judge Newman's

clerk re response.
010488 044.05F G 1.67
Draft answer.
010588 044.05F G 1.83
Opp. to writ.
010688 044.05F G 1.17
Opp. to writ.
010788 044.05F G 6.50
Draft opp. to writ.
020988 044.01F G 1.17
Review reply brief; conf. w/SF re argument.
021888 044.01F G .50
Review decision; conf. w/SF, BAF re request for publication.
021988 044.01F G 1.08
Draft letter requesting substitution.
022988 044.05F G .17
Letter to J. Johnson re publication order.
033088 044.01F G .92
Preliminary review of pet. for review.
033188 044.01F G .33
Conf. w/SF; letter to J. Johnson re pet. for review.
041288 044.01F G .17
Call w/JJ re decision not to answer petition for review.
101888 044.01F G 3.17
Draft motion, memo re atty fees; call w/Dept. 70 clerk re filing.
101988 044.01F G 1.83
Declarations re atty fees motion
102088 044.01F G 2.25
Revise papers re fee motion.

LUCERO vs. MUNICIPAL COURT
RECAP OF COSTS

January 87		
	Telephone charges	3.87
	Copier (260 @.20)	52.00
	Postage	5.48
	Messenger service	51.50
	Secretarial overtime	47.71
		160.56
February 87		
	Secretarial overtime	17.44
	Telephone charges	4.08
	Copier (428 @.20)	85.60
	Messenger service	19.00
		126.12
May 87		
	transcript of 5/14 Writ	10.00
	5/14 courthouse parking	7.75
	Mileage 60 mi RT @.25	15.00
32.75		
June 87		
	Copier usage (13 @ .20)	2.60
		2.60
August 87		
	Telephone charges	2.23
		2.23
December 87		
	Filing fees (2 briefs)	464.00
	Copier usage (1153 @ .20)	230.60
	Telephone charges	6.23
	Postage - brief mailing	10.15
	Messenger service	87.75
		798.73
January 88		
	Federal express	11.00

	Copier usage (832 @ .20)	166.40
	Telephone charges	10.96
	Messenger service	40.00
	Secretarial overtime	251.21
	Quickprint (covers)	2.66
		482.23
July 88		
	Copier usage (629 @.20)	125.80
	Lloyds attorney service	37.50
	Outside copying	5.33
		168.63
Total costs		1,773.85

Stuart L. Kadison declares as follows:

1. I am an attorney at law. I make this declaration in support of petitioners' motion for attorney's fees. I have personal knowledge of the facts stated herein and could testify to them competently if called upon to do so.

2. I was admitted to the State of California State Bar in 1948 and have practiced continuously in the greater Los Angeles area since then. I am a partner in the Los Angeles office of Sidley & Austin, a Chicago-based, national law firm.

3. I received my undergraduate education at New York in 1942. I attended the law schools of the University of Maryland and Stanford University, receiving an LL.B. degree in 1948. At the University of Maryland, I was a member of the Board of Editors on the Law Review. I have been a lecturer in law at Southwestern University and Stanford University Law

Schools. I was a member of the Board of Trustees of the Los Angeles County Bar Association from 1966 to 1972, and served as President of the Association in 1971-72. From 1973 to 1975, I was Chairman of the Special Committee on Delivery of Legal Services of the American Bar Association. I was a member of the board of Governors of the State Bar of California from 1973 to 1976. I am a member of the American Law Institute and a Fellow of the American College of Trial Lawyers and the American Bar Foundation. I am an experienced attorney in the Los Angeles area.

4. I have known Stanley Fleishman for more than forty years and have the highest regard for him personally and professionally. I am familiar with Mr. Fleishman's work. He is an outstanding litigator and appellate lawyer. He has handled many important cases in the United States Supreme Court, the United States Court of Appeals for the Ninth Circuit and the

California Court of Appeal. He has been a major moving force in the development of first Amendment law.

5. Mr. Fleishman's professional reputation in the community is excellent. The September 11, 1989 issue of the Los Angeles Daily Journal, §III, had an article on Mr. Fleishman and his firm. The article quotes Alfred T. Goodwin, Chief Judge of the United States Court of Appeals for the Ninth Circuit as saying: "After regularly appearing before me over a period of 30 years, Mr Fleishman is one of the few lawyers I can say I never found wanting in professional skills or anything else. It's obvious Mr. Fleishman believes in his clients and the issues he brings before the court. He is always professional, well prepared, and just feisty enough to keep things interesting." The article also refers to an order made by Judge Manuel Real, Chief Judge of the United

States District Court for Central District of California, stating that Mr. Fleishman is "recognized as one of the premier constitutional attorneys in this district."

6. I am familiar with attorney's fees in the greater Los Angeles area. Attorneys with Mr. Fleishman's reputation, experience and skill regularly charge $350 an hour and upwards working in an area of their expertise. I believe a rate of $350 an hour for Mr. Fleishman is fair and reasonable in this case, which involved first amendment issues in a central area of Mr. Fleishman's experience.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct. Executed this 23rd day of October, 1989, at Los Angeles, California.

Stuart L. Kadison